



Ombudsman Report

**Investigation into a complaint about a
meeting held by the Board of Management
for the Ridgeway Business Improvement
Area in the Town of Fort Erie
on November 2, 2016**

**Paul Dubé
Ontario Ombudsman
April 2017**

Complaint

- 1 On November 17, 2016, my Office received a complaint that the Board of Management for the Ridgeway Business Improvement Area (BIA) in the Town of Fort Erie discussed a matter in camera on November 2, 2016 contrary to the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 The complainant alleged that the subject matter discussed did not fall within any of the prescribed exceptions to the open meeting requirements, and that the Board failed to follow the Act’s procedures for closed meetings.

The Town of Fort Erie and the Ridgeway BIA

- 4 The Town of Fort Erie is a lower tier municipality in the Regional Municipality of Niagara.
- 5 Council for Fort Erie designated an area in the town as the Ridgeway Business Improvement Area (BIA) and established its boundaries through a by-law passed by council.
- 6 In accordance with the *Municipal Act*, council also established a board of directors to act as the BIA’s board of management. The board of management (the “board”) for the Ridgeway BIA is intended to consist of six community members and one member of council.

Ombudsman jurisdiction

- 7 Under the *Municipal Act*, all meetings of council, local boards, or committees of either of them must be open to the public, unless the matters discussed fall within prescribed exceptions.
- 8 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality or local board has complied with the Act in closing 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.

- 9 Section 204(2.1) of the *Municipal Act* specifies that a board of management for a business improvement area is a local board of the municipality for all purposes. Accordingly, the board of management for the Ridgeway BIA is a “local board” and its meetings are subject to the Act’s open meeting requirements.
- 10 The Ombudsman is the closed meeting investigator for the Town of Fort Erie and the Ridgeway BIA.
- 11 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the applicable procedure by-law have been observed.

Investigative process

- 12 On January 10, 2017, my Office issued notice in accordance with section 18(1) of the *Ombudsman Act* that we would be investigating this complaint.
- 13 Members of my Office’s staff obtained and reviewed the town’s procedure by-law and other by-laws applicable to the Ridgeway BIA. We reviewed relevant meeting materials, including the agenda, minutes, and closed session minutes for the November 2, 2016 meeting. We spoke with the town’s Clerk, the former Secretary of the board, the former Chair of the board, a current member of the board, and the board’s council representative.

Board procedures

- 14 Section 238(2) of the *Municipal Act* requires that every local board must pass a procedure by-law governing the calling, place and proceedings of meetings.
- 15 The Town of Fort Erie passed by-law 183-07 in 2007 to establish operating guidelines for BIAs. That by-law echoes the requirement in the Act for each BIA to pass a procedure by-law, and includes a template procedure by-law that could be amended and adopted by the board.

- 16 The operating guidelines state that BIAs should keep minutes and records of every meeting and forward signed copies of the minutes to all board members and the clerk following a meeting.
- 17 The operating guidelines state that the town's Clerk is to provide assistance to the board with respect to record-keeping, adopting policies, and procedural advice.
- 18 The town's clerk and the members of the board told us that the Ridgeway BIA has not passed a procedure by-law.
- 19 The Ridgeway BIA should adopt a procedure by-law governing the calling, place and proceedings of meetings, in accordance with its obligations under the *Municipal Act*.

Meeting on November 2, 2016

- 20 A regular meeting of the Ridgeway BIA board of management was held at 5:30 p.m. on November 2, 2016 at the Royal Canadian Legion Branch 230 in Ridgeway.
- 21 Below all other items of business, the meeting agenda listed an "in-camera confidential session for a private meeting with just the board of directors".
- 22 The meeting was called to order at 5:30 p.m. The meeting minutes indicate that the chair, secretary, treasurer, council representative, and one other board member were in attendance. Members of the public were also in attendance.
- 23 The meeting was adjourned at 7:00 p.m.
- 24 Members of the board told us that, following adjournment of the open meeting, the board held a closed meeting.
- 25 No resolution was passed to close the meeting.
- 26 No minutes were recorded during the meeting. Instead, minutes reflecting the discussion in camera were prepared approximately two weeks after the meeting and appended to the open session minutes.

- 27 The appended minutes state that the board went into a closed meeting at approximately 7:05 p.m. in the board room at the Legion to discuss a human resources issue. The five board members listed above were present. The minutes note that there was discussion and all members of the board “agreed on a course of action”.
- 28 Members of the board told us that, during the closed meeting, they were provided with information about the conduct of an employee of the board. Specific information and examples of conduct were provided.
- 29 Members were asked to determine how to proceed with respect to the employee’s contract. The board did not take a formal vote, but no one spoke against a suggested course of action.
- 30 Following the discussion, the board invited the employee to join the meeting. They conveyed the board’s position with respect to the employee’s contract and discussed how best to proceed.
- 31 According to the appended minutes, the meeting ended at approximately 7:50 p.m. No resolution was passed to end the meeting. No open portion of the meeting followed the closed session.

Analysis

Applicability of the exceptions to the open meeting rules

- 32 Although the board failed to pass a resolution to close the meeting, and did not reference any of the exceptions to the open meeting rules in the Act, we considered whether the discussion may have fit within any of the exceptions.
- 33 Section 239(2)(b) of the Act permits a local board to discuss personal matters about an identifiable individual, including a local board employee, in camera.
- 34 This exception does not apply to discussions about employees in their professional capacity. However, discussions about an individual in their official capacity can take on a more personal nature if the individual’s conduct is scrutinized.¹

¹ See e.g. IPC Order MO-2519, Township of Madawaska Valley (April 29, 2010).

35 The Information and Privacy Commissioner has established a two-part test to distinguish personal information from professional for the purposes of the open meeting rules.² The test is as follows:

1. In what context do the names of individuals appear? Is it in a personal or business context?
2. Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?

36 In this case, the discussion was about the individual in the context of their employment relationship to the BIA. However, the board talked about aspects of the individual's conduct that went beyond their professional role, such that if the information were disclosed, it would reveal something of a personal nature about the individual. The discussion fit within the exception in s. 239(2)(b) of the Act.

37 We also considered whether the discussion may have fit within the exception in s. 239(2)(d) for labour relations or employee negotiations. The exception generally applies to matters involving hiring, firing, and disciplining specific employees.

38 At the meeting on November 2, the board discussed an employee's job performance, and made a decision with respect to the individual's contract. This discussion fit within the exception for labour relations or employee negotiations.

Lack of resolution to close the meeting

39 The Act requires a local board to pass a resolution in public before holding a closed meeting. The resolution must state the fact that a closed meeting will be held, and specify the general nature of the matter(s) to be discussed.

40 As a best practice, a local board should also indicate which of the exceptions to the open meeting rules it is relying on to close the meeting.

² PO-2225 (12 January 2004) [online: IPC](#); Order MO-2368 (26 November 2008) [online: IPC](#).

- 41 The board for the Ridgeway BIA did not pass a resolution to close the meeting on November 2. Instead, the board adjourned its open meeting, then proceeded to discuss matters in camera.
- 42 To comply with the Act, the board should have passed a resolution to proceed in camera during its open meeting. Following the in camera meeting, the board should have passed a resolution to return to open session, at which time the open meeting could have been adjourned.

Voting in a closed meeting

- 43 Sections 239(5) and (6) of the *Municipal Act* prohibit municipal councils and local boards from voting in a closed session, except where the meeting discussions fall within one of the exceptions in the Act, and the vote is for a procedural matter or to give directions to staff.
- 44 Votes do not need to be taken in a formal manner in order for this rule to apply. A show of hands, straw poll, or consensus reached by the members can be considered a vote for the purposes of the open meeting rules.
- 45 The board of the Ridgeway BIA agreed, by consensus, to take certain steps with respect to the employee. The board then invited the employee into the closed meeting and communicated its decision.
- 46 That decision was not procedural, nor was it a direction to staff. The decision was made in the closed session, contrary to the open meeting rules.

Failure to record in camera minutes

- 47 Subsection 239(7) of the Act requires a local board to record, without note or comment, all resolutions, decisions, and other proceedings at a meeting, whether it is closed to the public or not.
- 48 No minutes were recorded by the board during the closed meeting on November 2.
- 49 Instead, closed session minutes were drafted weeks later by a member of the board. The minutes indicate the start and end time of the meeting, the members present, and the general nature of the matter discussed.

- 50 To ensure an accurate record of proceedings, minutes should have been recorded during the closed meeting.
- 51 Further, the reconstructed minutes fail to reflect the decision reached by the board members during the closed meeting.
- 52 The Act requires meeting minutes to record all resolutions, decisions, and other proceedings. The minutes of the board's in camera meeting on November 2 should have recorded the decision made by the board.

Education and training for members of local boards

- 53 Local boards and committees of council are often composed of volunteer members of the public. That is the case for the majority of the Ridgeway BIA. On November 2, all members of the board were volunteers, aside from one council representative.
- 54 The board members told us that they had never been provided with training on the open meeting rules or the board's obligations under the *Municipal Act*. The council representative told us that, while she received training on the rules with respect to council, she did not realize they applied to the board.
- 55 Since this complaint was brought forward, board members told us they have been operating under the open meeting rules. The town's Clerk told us that the town plans to provide training on the open meeting rules to the board, and that some such training has already begun.
- 56 The Town of Fort Erie should ensure that all members of its local boards and committees receive training with respect to the open meeting rules.

Opinion

- 57 The Board of Management for the Ridgeway Business Improvement Area did not contravene the *Municipal Act, 2001* when it discussed a matter in camera on November 2, 2016 that fit within the exceptions in Act for personal matters about an identifiable individual and labour relations or employee negotiations.

- 58 However, the board contravened the Act by failing to pass a resolution to close the meeting, failing to record minutes during the meeting, and voting in camera.
- 59 The board also contravened the Act by failing to pass a procedure by-law governing the calling, place, and proceedings of meetings.

Recommendations

- 60 I make the following recommendations to assist the Ridgeway Business Improvement Area Board of Management and the Town of Fort Erie in fulfilling their obligations under the Act and enhancing the transparency of meetings.

Recommendation 1

All members of the Board of Management for the Ridgeway Business Improvement Area should be vigilant in adhering to their individual and collective obligation to ensure that the board complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 2

The Board of Management for the Ridgeway Business Improvement Area should adopt a procedure by-law governing the calling, place and proceedings of meetings, in accordance with its obligations under the *Municipal Act*.

Recommendation 3

The Board of Management for the Ridgeway Business Improvement Area should ensure that a resolution is passed in open session stating the fact of a closed meeting and the general nature of the subject(s) to be discussed before going into a closed meeting.

Recommendation 4

The Board of Management for the Ridgeway Business Improvement Area should ensure that minutes are recorded during all of the board's meetings, whether open or closed.

Recommendation 5

The Board of Management for the Ridgeway Business Improvement Area should ensure that minutes record all proceedings of the board, including all resolutions and decisions.

Recommendation 6

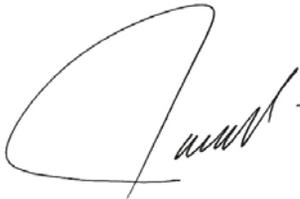
The Board of Management for the Ridgeway Business Improvement Area should ensure that its in camera votes comply with sections 239(5) and (6). In order for council to vote in closed session, it must meet the requirements under section 239(6) and the meeting must have been properly closed.

Recommendation 7

The Town of Fort Erie should provide education and training to the members of each of its local boards with respect to the boards' obligations under the *Municipal Act* to pass a procedure by-law, and to comply with the open meeting requirements.

Report

- 61 The Board of Management for the Ridgeway BIA and council for the Town of Fort Erie were given the opportunity to review a preliminary version of this report and provide comments. No comments were received.
- 62 My report should be shared with the Ridgeway BIA board and council for the town. The report should be made available to the public as soon as possible, and no later than the next meeting of the BIA.



Paul Dubé
Ombudsman of Ontario