



Ombudsman Report

**Investigation into whether
Council for the Township of Russell
held an illegal closed meeting
on June 1, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
October 2015**

Complaint

- 1** On June 2, 2015, my Office received a complaint about a closed meeting held by council for the Township of Russell on June 1, 2015. The complaint alleged that two of the matters discussed in camera did not fit within the exceptions to the open meeting provisions of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 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** As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has properly closed 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.
- 4** My Office is the closed meeting investigator for the Township of Russell.
- 5** When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

Investigative process

- 6** On June 23, 2015, my Office advised council for the Township of Russell that we would be investigating this complaint.
- 7** Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township's procedure by-law and the Act, as well as relevant meeting agendas, minutes, presentation materials and other supporting documentation. They spoke with the Clerk, the Mayor and the township's four councillors.
- 8** My Office received full co-operation in this matter.

Council procedure

- 9** The township's procedure by-law (by-law 2015-45) provides that regular meetings of council will be held at 5:30 p.m. on the first and third Monday of each month, with the exception of the month of July, when there are no regular meetings, and the months of August and December, when there is one regular meeting held on the second Monday of the month.
- 10** The by-law states that, prior to holding a closed meeting, council shall state by resolution the purpose of holding the closed meeting and the general nature of the matter to be considered.
- 11** The by-law states that meetings are to be open to the public, subject to the exceptions outlined in section 4.11 of the by-law (reproduced in part below).

4.11 Closed to Public – Closed Meeting

A meeting or part of a meeting of the Council or its Standing Committees may be closed to the public, by Resolution, if the subject matter being considered is...

- g) A matter in respect of which a Council, local board, committee or other body has authorized a meeting to be closed under another Act
- a. A matter relating to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*, if Council is designated as head of the institution for the purposes of the Act.
 - b. Educational or training session
 - c. A meeting of a Council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:
 - i. The meeting is held for the purpose of educating or training the Members; and
 - ii. At the meeting, no Member discusses or otherwise deals with any matter in a way that materially advances the business or decision – making of the Council, local board or committee.

12 The exceptions in the by-law mirror the closed meeting exceptions from section 239 of the Act save for the following three discrepancies:

- the *Municipal Freedom of Information and Protection of Privacy Act*¹ (*MFIPPA*) and “education and training” exceptions are nested under the “or any exception authorized under another Act” exception even though each of these are standalone exceptions;
- the *MFIPPA* exception from subsection 239(3) of the Act is listed in the by-law as a discretionary exception. However, the Act requires that council’s discussion of an *MFIPPA* request occur in camera; and
- the by-law includes an exception that appears to be simply “Education or training session”. Below this “exception” is the correct exception for education and training sessions.

13 Council for the Township of Russell should amend its procedure by-law to accurately reflect the closed meeting exceptions in section 239 of the Act.

June 1, 2015 meeting

14 On June 1, 2015, at 5:30 p.m., council for the Township of Russell held a regular council meeting in council chambers. Notice of the meeting was provided on the township’s website and in the procedure by-law. The Mayor and all four councillors were present, as well as various members of staff. The agenda indicated that three matters would be discussed in closed session. My Office reviewed complaints related to the first and third in camera matters.

Rebranding exercise

15 The agenda listed the first in camera matter as “Verbal Presentation of Re-Branding Exercise – Verbal”. The resolution to enter closed session cited the education or training exception (section 239(3.1) of the Act) and reproduced the description from the agenda.

16 Two external consultants were present for this discussion, in addition to council and staff. The consultants had been hired to present council members with options to “rebrand” the township, including creating a new logo and slogan. The

¹ *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990 c M.56.

consultants gave a PowerPoint presentation summarizing the results of this process. The presentation concluded by suggesting a new logo and slogan for council's approval. This presentation was the first time council was shown the proposed logo and slogan.

- 17** Interviews with the Clerk, Mayor and councillors indicate that, prior to entering closed session, the Mayor explicitly instructed council not to ask any questions or voice any opinions during the rebranding presentation. Rather, councillors were told to write down their questions and ask them in open session following the presentation. Each councillor indicated that this advice was assiduously followed; councillors did not ask questions or discuss the content of the rebranding presentation in camera.
- 18** When open session resumed, council reported back that the consultants had provided a presentation about rebranding. An extensive discussion about the presentation occurred. During the discussion, the suggested new slogan, but not the logo, was made public.
- 19** Following this discussion, the Mayor and four councillors unanimously voted to approve the new logo and slogan. The vote was recorded at the Mayor's request.

Analysis

Applicability of the "education or training" exception

- 20** Section 239(3.1) of the *Municipal Act, 2001* states that council may close a meeting to the public if the meeting is held for the purpose of "educating or training" members, and if no member discusses or otherwise deals with a matter in a way that materially advances the business or decision-making of council.
- 21** My Office has noted the limits of the education and training exception. In a report entitled "The ABCs of Education and Training", regarding an investigation into closed meetings in the City of Oshawa, my Office stated that:

Councils and committees should avoid using closed education sessions as opportunities to consider information that will form the basis for their future decision-making, unless they otherwise come within the exceptions to the open meeting requirements and are properly authorized on that basis.²

² "The ABCs of Education and Training": Investigation into City of Oshawa Development Services Committee Special Meeting of May 22, 2008, Ontario Ombudsman, 23 March 2009, online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/oshawamay08final.pdf>>.

- 22** Local Authority Services (LAS) has also stated that this exception is only appropriate where “the sole purpose is to provide education or training [and] where no transactional business or decision making occurs during the session”.³ In its report regarding a closed meeting in the County of Essex, LAS rejected the county’s assertion that updating councillors regarding the status and progress of various initiatives of a local development corporation amounted to “educating and training”. LAS stated that “[t]o conclude otherwise would allow Council to go into closed session any time a member wanted merely to impart information”.⁴
- 23** In a 2013 report regarding closed meetings in the Township of Madawaska Valley, LAS found that a presentation, which included an “educational” component but primarily outlined specific options available to the town for imposing development charges, did not fall within the education or training exception.⁵ The allowable “educational” component of the presentation related to the general purpose and process of development charges. However, the majority of the presentation fell outside the education and training exception because it was intended to inform council of the findings of a study specifically commissioned by the township on the issue of proposed development charges.
- 24** Similarly, in my Office’s 2014 investigation into a closed meeting in the Town of Moosonee, my Office determined that a consultant’s presentation was not a proper use of the education or training exception.⁶ In that case, Moosonee council went in camera to obtain information from a municipal advisor about specific grants the town would be receiving and about conditions attached to those grants. My Office determined that the information presented was not general in nature and related to matters that directly impacted the business of the municipality. Following the presentation, Moosonee council voted in open session to approve the course of action presented by the municipal advisor.
- 25** These facts closely parallel what occurred in the Township of Russell. Council went into closed session to obtain information about a specific rebranding option

³ Local Authority Services, *Report to the Corporation of the County of Essex Regarding the Investigation of the Closed Meeting of Essex County Council Held On July 2, 2009* (September 2009: Amberley Gavel Ltd.) online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc> at pg 13.

⁴ *Ibid* at pg 13.

⁵ Local Authority Services, *Report to the Council of the Township of Madawaska Valley* (June 2013: Amberley Gavel Ltd.), online: <http://www.agavel.com/wp-content/uploads/2013/09/Madawaska_Valley_2013.doc> at pg 15.

⁶ *Town of Moosonee Letter*, Ontario Ombudsman, 9 September 2014, online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Moosonee-closing.pdf>>.

for the township. After returning to open session, council debated the rebranding proposal and ultimately voted to approve the new logo and slogan. Even though no discussion occurred during the closed session presentation, the information presented was directly about council business and was intended to form the basis of its decision-making. Accordingly, the rebranding presentation did not fit within the education or training exception in section 239(3.1). The presentation did not fit within any of the other exceptions contained in the Act and should have been made in open session.

Report CS 10-2015

- 26** The third matter discussed in closed session was listed on the agenda as “Report CS 10-2015”. The report itself was not public. The resolution to enter closed session cited the exception for “personal matters about an identifiable individual” and reproduced the description from the agenda.
- 27** While in camera, council discussed the employment history, job performance, and salary information of an identified municipal employee. When council returned to open session, members voted to pass a by-law appointing the individual to the position of Deputy Clerk for a defined term.

Applicability of the “personal matters” exception

- 28** The Act does not define “personal matters” for the purposes of section 239 of the *Municipal Act, 2001*. However, the related term “personal information” is defined in the *Municipal Freedom of Information and Protection of Privacy Act*, as, in part:

[R]ecorded information about an identifiable individual, including...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;...
- (g) the views or opinions of another individual about the individual; and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

- 29** The IPC has found that information will only qualify as personal if it pertains to the individual in his or her personal, rather than professional, capacity. However, information about a person in his or her professional capacity may still qualify if

it reveals something personal.⁷ The IPC has confirmed that information about a person's employment history, such as start and end dates and years of service, qualifies as personal information for the purpose of the *MFIPPA*.⁸

30 Both LAS and my Office have determined that discussions of employee performance properly fit under the personal matters exception.⁹ LAS has also determined that matters related to individuals' salaries, fees for service and overtime requests fall within the personal matters exception.¹⁰ Similarly, in an investigation into closed meetings in the Town of Mattawa in 2010, my Office noted that an individual's salary was considered to be personal information.¹¹

31 In this instance, the closed session report and council's discussion identified the candidate by name and discussed the individual's employment history, job performance and salary information. Accordingly, this discussion fit within the closed meeting exception for personal matters about an identifiable individual in section 239(2)(b) of the Act.

Procedural matters

Resolution to proceed in camera

32 Council's resolution to enter closed session identified the third matter as "Report CS 12-2015". No additional information about the subject matter was included. This provided limited information about the issue council would discuss in camera since the report was not available to the public.

⁷ Information and Privacy Commissioner, Orders MO-2204 and MO-3177-I.

⁸ Information and Privacy Commissioner, Orders MO-3177-I and MO-2705.

⁹ Local Authority Services, *Report to the Corporation of the Municipality of Northern Bruce Peninsula with Respect to a Meeting Held March 11, 2013*, (January 2014: Amberley Gavel Ltd.) online:

<<http://www.agavel.com/wp-content/uploads/2013/09/Northern-Bruce-Peninsula-2013-final.docx>>; *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013*, Ontario Ombudsman, February 2015, online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Niagara-Falls-Feb2015.pdf>> at para 48.

¹⁰ Local Authority Services, *A Report to the Council of the Township Of Madawaska Valley*, (June 2013: Amberley Gavel Ltd.) online: <http://www.agavel.com/wp-content/uploads/2013/09/Madawaska_Valley_2013.doc> at pg 9.

¹¹ *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings*, Ontario Ombudsman, December 2010, online: <<http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>> at para 53.

- 33** Section 239(4)(a) of the *Municipal Act* requires that the resolution to enter closed session disclose the “the general nature of the matter to be considered”. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*,¹²

[T]he 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.

- 34** In a 2014 report regarding closed meetings in the Municipality of Kincardine, LAS interpreted this as requiring that “the wording of the resolution...do more than simply refer to the section of the *Municipal Act* that permits the closed meeting exception”.¹³ Further, there is a requirement that municipalities add a “level of informative detail” to the resolution to enter closed session. In reaching this conclusion, LAS noted that the principles of openness and transparency are at the core of the open meeting provisions of the *Municipal Act*, and that these principles require maximizing the information available to the public.
- 35** By providing incomplete information regarding the subject to be discussed in closed session, the Township of Russell violated the requirement in the Act to describe the general nature of the subject matter to be discussed in a way that maximized the information available to the public. A more descriptive resolution, such as “Report CS 12-2015, Staffing Issue”, would have provided more information to the public without undermining the reason for meeting in camera.
- 36** In the interest of transparency, the Township of Russell should ensure that resolutions to enter closed session contain a general description of the issue to be discussed, including when referencing confidential reports or materials.

Recording meeting proceedings

- 37** Council for the Township of Russell has adopted the practice of video recording and live-streaming the open sessions of council meetings. I commend this practice because it increases transparency and makes council proceedings more accessible to the public.

¹² [2007] OJ No 919, at pg 151.

¹³ Local Authority Services, *Report to the Corporation of the Municipality of Kincardine Regarding Allegations of Improperly Closed Meetings of the Council for the Municipality of Kincardine Between February 6, 2013 and January 20, 2014*, (July 2014: Amberley Gavel Ltd.) online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>> at pg 8.

- 38** However, my investigation found that the township stops video recording when council enters closed session, and the video recording is not re-started following the in camera discussion. Any proceedings that occur after council returns to open session are not video recorded or streamed live.
- 39** I strongly encourage municipalities to make complete audio or video recordings of both open and closed council proceedings. This provides the clearest, most accessible record for closed meeting investigators to review, and assists in ensuring that council does not stray from legal requirements during closed meetings.
- 40** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These municipalities include: the Townships of Tiny, Adelaide Metcalfe, Brudenell, Lyndock & Raglan, and McMurrich-Monteith; the Towns of Midland and Fort Erie; the Municipalities of Lambton Shores and Brighton; and the Cities of Oshawa, Sault Ste. Marie, Brampton, Niagara Falls, and Welland.

Opinion

- 41** My investigation found that council for the Township of Russell contravened the *Municipal Act, 2001* on June 1, 2015 when it went in camera for a presentation on township rebranding. This matter did not fall within any of the Act's exceptions to the open meeting requirements.
- 42** Council did not contravene the Act during the same in camera session when it considered a staffing matter referred to as Report CS 10-2015.
- 43** My investigation also found that council for the Township of Russell violated section 239(4)(a) of the *Municipal Act, 2001* by failing to state by resolution the general nature of the matter to be considered with respect to Report CS 10-2015.

Recommendations

- 44** I make the following recommendations to assist the township in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Township of Russell should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Council for the Township of Russell should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

When proceeding in camera, council for the Township of Russell should pass a resolution that includes both the fact of holding the closed meeting and the general nature of the subject matter to be discussed.

Recommendation 4

Council for the Township of Russell should amend its procedure by-law to appropriately reflect the closed meeting exceptions in section 239 of the *Municipal Act, 2001*.

Recommendation 5

Council for the Township of Russell should implement the practice of audio or video recording its closed sessions and should ensure that the current practice of recording open sessions is expanded to include the open session discussion occurring after council returns from closed session.

Report

- 45** The Clerk and councillors for the Township of Russell were provided with an opportunity to comment on this report. Those who reviewed my report and recommendations chose not to comment.
- 46** My report should be shared with council for the Township of Russell and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario