


Ombudsman
ONTARIO

ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

March 17, 2011

Ms. Brenda Percy, Manager, Council & Legislative Services / Clerk
Town of Amherstburg
271 Sandwich St South
Amherstburg, Ontario
N9V 2A5

Dear Ms. Percy:

Re: Ombudsman Review of Closed Meeting held February 10, 2011

I am writing further to our telephone conversation of March 16, 2011 regarding the results of the Ombudsman's preliminary review of a complaint received about a closed special meeting of Council held on February 10, 2011.

As part of our Office's review of this complaint we spoke with you and Mayor Hurst, and reviewed both the open and closed meeting materials from the February 10 meeting. We also reviewed relevant portions of the *Municipal Act, 2001* (the Act) and the Town's Procedure By-law (By-law No. 2008-28).

The information provided to our Office indicates that on February 9 a local newspaper ran a story regarding the naming of the Town's new recreation centre. Specifically, the report stated that an individual donated over \$100,000 towards the new recreation centre in exchange for naming rights, and that this individual was a convicted sex offender. We understand that once this information became public some of the Town's citizens began petitioning to have the Town rescind the agreement pertaining to the naming rights.

The Calling of the Emergency Meeting

You advised our Office that Mayor Hurst decided to call an emergency meeting of Council to discuss the recent media reports. The Mayor considered this matter to be a "bona fide emergency" because the recreation complex was very important to Council's plan to revitalize the community, and it was felt that the media reports could be damaging.

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The calling of emergency and special meetings is outlined in s. 9 of the Town's procedure By-law:

9(d)...Special Meeting(s) shall be held not sooner than 48 hours following the notification or receipt of the petition, as the case may be and the clerk shall provide notice of the special meeting.

e)...in the event of a bona fide emergency the meeting may be held as soon as practicable following receipt of the summons or petition, as the case may be, and notice may be given by telephone or personal contact as determined by the clerk.

Regarding public notice of meetings, the By-law states:

a. Dates and times for all meetings...will be posted at a minimum of five days prior to the scheduled meeting. *Where five days notice of the meeting is not possible due to the emergency "calling" of a meeting, notice will be posted as soon as possible after the meeting is called.* Notice will be posted on the Town Website and posted on the board in the main entrance at Town Hall. Every effort will be made to advertise meeting dates in local media where time permits. *(emphasis added)*

On the morning of February 9 the Town's CAO circulated an email to all of Council requesting that they attend a "Special in Camera Council meeting called 8:30 AM Thursday February 10th re litigation/potential litigation issue concerning the...story in the Windsor Star."

You advised our Office that notice of the special meeting was provided to the public by posting the agenda on the Town's website at approximately 4:30 PM on February 9, and also by placing hard copies of the agenda on the counter in the Town office.

It would appear that Council did follow the Procedure By-law in calling the February 10 emergency meeting, and took steps to notify the public of the meeting.

The Closed Session

All of Council was present for the closed session, as well as the CAO, the Manager of Human Resources, and the Town's solicitor. In open session Council passed a resolution:

"That Council move into a Closed Session Meeting of Council, at 8:30 A.M., pursuant to section 239 of the Municipal Act, 2001, as amended, for the following reason:

1. Litigation/Potential Litigation matters [239 (2e)]"

You advised our Office that the "litigation/potential litigation" exception was cited in the resolution to proceed *in camera* on the advice of the Town's solicitor. You noted that the issue

being discussed could result in future legal action and that potential litigation was therefore considered the appropriate exception.

As discussed on March 16, our Office is of the view that the exceptions to the open meeting requirements outlined in s. 239(2) should be narrowly construed. We referred you to the Ontario Court of Appeal's decision in *RSJ Holdings Inc. v. London (City)* [2005] O.J. No. 5037. In that decision the Court of Appeal stated:

“The fact that there might be, or even inevitably would be, litigation arising from [the by-law] does not make the subject matter under consideration potential litigation.”

We understand that at the time of the February 10 meeting there was no actual evidence of any current or future legal proceedings related to this issue. We noted that it is our Office's view that mere speculation that litigation may arise in the future is not sufficient to bring a discussion within the scope of s. 239(2)(e). It would therefore appear that the discussion of the naming rights that took place on February 10 could not fit within the limited scope of s. 239(2)(e). We also noted that the Town's solicitor was present during the closed session, and suggested that Council consider whether a different exception, such as solicitor-client privilege, would have been appropriate in this case.

In the future, Council should be vigilant in ensuring that the most appropriate exception or exceptions are cited in the resolution to proceed into closed session, and that all discussions taking place *in camera* fall within the cited exception(s). This ensures that the public is fully aware of why Council is proceeding into closed session, and increases the transparency of the Council process.

The Vote

The closed session minutes state,

“A litigation/Potential Litigation Matter...was discussed. Deputy Mayor Sutherland moved, Councillor Davies seconded:
That Council repeal the By-laws and return the money to the donor;
And further that all signage removed (sic) immediately and the public be informed of the action.
A recorded vote was taken.”

The Mayor advised our Office that this vote was done by way of a “show of hands”, and that it was not unusual for Council to take informal votes such as this in closed session.

You advised our Office that members of the public and local media gathered outside Council Chambers during the meeting, and that after the closed session was adjourned the Mayor gave a

verbal statement to the effect that Council determined that it was in the best interests of the Town to return the donation.

We understand that Council also passed a By-law during the open portion of the February 22 Council meeting, repealing the By-laws authorizing the execution of the donation agreements.

As discussed on March 16, although Council passed the By-law revoking the earlier By-laws relating to the donation agreements in open session on February 22, it is clear that this decision was made by way of a vote during the February 10 closed session. We noted that s. 244 of the Act states that votes must be taken in open session, subject to the narrow exception outlined in s. 239(6) of the Act, which permits voting *in camera* for procedural matters or for giving directions to staff. Voting during a closed session, including informal votes such as “straw polls” or “show of hands”, is not permitted. Council therefore contravened the *Municipal Act* by voting during the February 10 closed session.

In the future, Council should ensure that no voting takes place during closed session, unless the vote is for a procedural matter and/or giving direction to staff, in accordance with s. 239(6) of the Act.

During our conversation of March 16 you expressed general agreement with our Office’s findings and suggestions. We requested that you discuss our review with Council publicly, and make copies of our letter available to the public. We ask that you notify our Office when you have had the opportunity to do so. We will also be providing the complainant with the outcome of our review.

I would also like to take this opportunity to thank you for the cooperation our Office received during this review.

Sincerely,



Michelle Bird
Ombudsman Ontario