

September 9, 2014

Mayor Victor Mitchell
Ms. Shannon MacGillvray, Chief Administrative Officer
Ms. Shelley Petten, Clerk
Town of Moosonee
5 First Street, P.O. Box 727
Moosonee, ON
P0L 1Y0

Dear Mayor Mitchell, and Ms. MacGillvray and Ms. Petten:

RE: Our File No. 287084-001

I am writing further to my conversation with Ms. MacGillvray and Ms. Petten of September 8 about the outcome of our investigation of a complaint we received on May 1, 2014, regarding meetings held by the town council on April 22, June 25 August 12, and August 26, 2013. The complaint alleged that notice of the meetings was not provided, and that the subject matter of the discussions may not have fit within the exceptions to the open meeting requirements set out in the *Municipal Act*.

As you know, the *Municipal Act 2001* (the Act) requires that all meetings of council, local boards, and their committees be open to the public, with limited exceptions.

In reviewing this complaint, our Office obtained and reviewed the materials for the meetings in question and spoke with municipal staff. We also reviewed relevant sections of the Town's Procedure By-law and the Act.

Procedure by-law (by-law 03-08)

The by-law states that regular meetings of council shall be held on the second and fourth Mondays of each month at 6:30 p.m.

A special meeting may be convened with 24 hours' notice to council (4(b)) Subsection (g) notes that a special meeting to deal with an emergency may be convened as soon as practical.

Section 4(h) states that notice of public meetings shall be posted on the community channel, and on the public bulletin boards at the Northern Store and the Canada Post Office.

Giving Notice

The complaint to our Office alleged that no notice of these meetings was given – or if notice was given, it was not done in accordance with the requirements of the Procedure By-law.

You advised us that notice of a special meeting is generally posted as soon as the clerk is told a meeting will be held. The Chief Administrative Officer, who was the acting clerk at the time of the meetings in question, said it could be “a matter of hours” between the posting of the notice and the meeting. Staff members were unable to recall specifics regarding when notice of these meetings was posted.

Agendas are usually posted on the public bulletin boards at the post office, the municipal office and the Northern Store. The Chief Administrative Officer said she believed notice of these meetings was posted in the usual way.

Although the by-law states that notice of meetings shall be posted on the community TV channel, the Clerk advised us that this does not happen for special meetings because there typically is not enough time to get the information on the community channel before the meeting occurs.

Analysis

The information provided to our Office indicates that notice of these meetings was posted, but that it was not done in accordance with the Procedure By-law. If it is not possible to advertise notice of special meetings on the community channel, council should consider revising its by-law to reflect the town’s actual practice for providing notice of meetings.

The Procedure By-law only provides for council members to receive 24 hours’ notice of special meetings. Section 238(2.1) of the Act requires that the Procedure By-law provide for notice to the public of all meetings, including special meetings. Accordingly, the by-law should be revised to include the manner and time frame in which notice of special meetings is provided to the public.

Although staff could not recall exactly when notice of these special meetings was provided, the Chief Administrative Officer advised that notice of special meetings could be posted “a matter of hours” before they occur. We discussed that the Procedure By-law provides for at least 24 hours’ notice to council members of a special meeting. In order to ensure that the public is fully informed of the time and

location of council meetings, they should only be called on short notice in cases of genuine emergency.

The meetings

April 22, 2013

The agenda stated that the meeting would begin at 6:30 p.m. Item 14 on the agenda was “closed session.”

The open session minutes state that council resolved to proceed in camera at 7:34 p.m. to discuss:

- Personal matters about an identifiable individual
- Employee negotiations or labour relations

The closed session lasted approximately an hour. While in camera, council discussed an employee mediation and a personal matter. Both matters fit within the cited exceptions.

June 25, 2013

The agenda for the June 25 meeting stated that the meeting would begin at 12:00 p.m. The closed session was the first item on the agenda. The agenda states: “teleconference with legal counsel.”

The open session minutes state that council resolved to proceed in camera at 12:09 p.m. “for the purpose of discussing litigation or potential litigation including matters before administrative tribunals affecting the Town Council.”

While in camera, council discussed a letter it had received from its legal counsel, pertaining to two matters. Both matters involved either ongoing litigation, or discussions of possible future litigation. These discussions fit within the cited exception. As discussed on September 8, the “advice subject to solicitor client privilege” exception (s. 239(2)(f) of the Act) could also have applied, as council was discussing specific legal advice from the municipality’s solicitor.

During the closed session, the acting clerk was directed to obtain further information. This was not done via formal vote, but it was generally understood that all of council was in agreement with the direction.

Section 239(6) allows for a vote to be taken in closed session if the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality. For the sake of clarity, directions to staff should be included in a resolution and passed in camera, and recorded in the minutes.

Council reconvened into open session at 12:25 p.m. No further information was provided about the closed session.

August 12, 2013

The agenda stated that there would be a closed session held at 4:30 p.m. to discuss a labour relations matter and a matter related to litigation/potential litigation.

The open session minutes state that council resolved to proceed in camera at 4:30 p.m. for the reasons noted on the agenda. While in camera, council discussed a union agreement and received an update on an ongoing litigation. Both matters fit within the cited exceptions.

August 26, 2013

The agenda for the August 26 meeting stated that there would be a closed session at 5:00 p.m., citing the Act as follows: "Under subsection 239(3.1) for the purposes of educating or training AND that no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of council, local board, or committee."

The closed session minutes state that a Municipal Advisor from the Ministry of Municipal Affairs and Housing was present to review some information for council, including a letter from the Minister, and to provide council with information on the terms and conditions of funding agreements.

The letter from the Minister noted that she had met with a delegation of council to discuss provincial funding for the town. The letter advised the town that it would be receiving a provincial grant, and outlined conditions that the town would have to fulfill in return, including financial reporting requirements to the Ministry.

When the open session resumed, council voted to approve the signing of various grant agreements with the province.

We also spoke with the Municipal Advisor who attended the meeting. She confirmed the information she presented on August 26, 2013 related to Ministry information about the terms and conditions of the funding agreement.

Analysis

Section 239(3.1) states that council may close a meeting to the public if the meeting is held for the purpose of educating or training members, and no member discusses or otherwise deals with a matter during the meeting in a way that materially advances the business or decision-making of council.

As noted in the Ombudsman's Report *The ABCs of Education and Training*¹,

While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only. Any attempt to rely on this exception must be carefully scrutinized. A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as 'educational.'

Further, in an investigation regarding the Town of Midland, the Ombudsman noted²:

In my view, none of the items discussed at this meeting were appropriate for consideration under the "education or training exception," as the information discussed or exchanged was directly on the subject of council business and was clearly intended to advance the business of council and/or form the basis of future decision-making.

In this case, Moosonee council was obtaining information from the Municipal Advisor about specific grants the town would be receiving, and about conditions attached to those grants. The information was not general in nature, and related to matters that directly impacted the business of the municipality. This discussion did not fit within the "education or training" exception, or any exception to the open meeting requirements.

Other procedural matters

On September 8, we also discussed some procedural issues that came to our attention during this review.

¹ Report regarding a May 22, 2008 meeting of the City of Oshawa Development Services Committee, available here:
<https://ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/oshawamay08final.pdf>

² Report regarding meetings held by Midland Town Council between December 2011 and March 2012

Resolution to Proceed In Camera

Firstly, the resolution to proceed in camera for these meetings only contains the wording of the exception council is relying on to go into closed session. As noted by the Court of Appeal in *Farber v. Kingston City*,³ “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.” We discussed that council should provide a brief description of the subject matter being considered in closed session, in addition to providing the exception it is relying on to close its doors.

Reporting Back

Council does not follow a practice of reporting back to the public after a closed session. The Ombudsman encourages councils to report back on what occurred in camera, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session, together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Meeting record

Council’s open session minutes only record motions/resolutions, and the closed session minutes for these meetings contained very little detail. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed in a meeting should not be referred to.

As noted in the Ombudsman’s Report *The ABCs of Education and Training*:

The admonition not to include notes or comments does not mean that no information regarding the subjects discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the open meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. While extraneous notes and comments not germane to the actual proceedings of

³ [2007] O.J. No. 919, at page 151

a committee should be excluded, the minutes should reflect what actually transpired, including the general nature of the subjects discussed.

We encourage the Town of Moosonee to consider audio recording its closed meetings. As noted in the Ombudsman's 2011-2012 annual report on open meetings:

Audio or video recording of council meetings should be routine – not just the open sessions, but the closed ones too. This would assist immeasurably in ensuring officials do not stray from the legal requirements once they retreat behind closed doors, and would provide a clear, accessible record for investigators to review.

We discussed that our Office is aware of several municipalities that follow this practice, including the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Town of Midland, the Municipality of Lambton Shores and the City of Oshawa.

When we spoke on September 8, I outlined our Office's findings and gave you the opportunity to provide comments, which have been incorporated into this letter. You agreed to share our letter publicly at the council meeting on September 22, and to make a copy available to the public.

I would like to thank you for your cooperation during our review.

Sincerely,

Michelle Bird
Open Meeting Law Enforcement Team