



Report

Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008

**André Marin
Ombudsman of Ontario**

February 6, 2009

Complaint

- 1 On May 5, 2008, my Office received a complaint concerning a special meeting held by the council of the Township of Nipissing on April 25, 2008. This meeting was conducted by telephone for the purpose of approving an invoice received earlier that day for a new fire truck. The complainant suggested that since the public couldn't attend the telephone meeting, it was an unauthorized closed meeting of council.

Ombudsman Jurisdiction

- 2 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigators 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 The Township of Nipissing has not appointed its own investigator and accordingly, the Ombudsman is the Township's closed meeting investigator under s.239.1 of the *Municipal Act, 2001*.
- 5 In investigating closed meeting complaints, my Office considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal by-laws.

Special Meetings of Nipissing Council

- 6 The Township's procedure by-law provides that the Head of Council or the Clerk (upon receipt of a petition from the majority of council members) may summon a special meeting of council. Although public notice of every meeting must be provided at least 24 hours prior to the meeting, where a special meeting is called and it is not possible to give such notice, the clerk can post such notice as soon as is practicable after the meeting has been scheduled.
- 7 Special meetings differ from regular meetings of council, which are held in accordance with a set schedule. Special meetings may be called between regularly scheduled meetings to address matters that arise and cannot be postponed until the next scheduled meeting.
- 8 The procedure by-law also states that all meetings of council, or committees of council, must be open to the public. The by-law lists a number of exceptions, in keeping with the provisions of the *Municipal Act, 2001*, under which meetings may be closed to the public.

Special meetings, like other council meetings, must be open to the public unless their subject matter falls within one of the listed exceptions.

Investigative Process

- 9** On August 15, 2008, following preliminary inquiries, the Township was notified that my Office would be pursuing an investigation into the complaint concerning the special meeting of council held on April 25, 2008.
- 10** During the course of our investigation, we interviewed 11 individuals, including all members of the council, the Deputy Clerk/Treasurer, the former Clerk/Treasurer, the roads superintendent, members of the fire department and other municipal staff.
- 11** In addition, documents were obtained from the municipality and reviewed, including minutes, agendas, correspondence and municipal records. We also reviewed a number of municipal by-laws and applicable legislation.
- 12** The Township of Nipissing co-operated fully during the investigation.

Investigation Facts

- 13** During the investigation, we learned that the Township's old fire truck had been bought, secondhand, almost 20 years ago. The fire department had expressed concern for some time regarding the truck's ability to perform to the necessary level. Council considered the matter and approved the issuance of a Request for Tenders for the supply of a new fire truck. A tender was accepted and an official purchase order was issued on March 26, 2008. However, the Township soon realized that the fire truck it had ordered did not have certain standard required features. During our investigation, the Fire Chief confirmed that he had authorized ordering these additional components, because the fire truck would be unsuitable for the Township's use without them.
- 14** On April 18, 2008, the fire truck manufacturer issued an invoice to the Township, which reflected the additional components. The invoice exceeded the amount initially approved by council. The invoice was discussed at the regular council meeting of April 22, 2008, which was open to the public.
- 15** Although it is not recorded in the minutes, we were told that at the April 22, 2008 regular meeting of council, it was decided that Councillor Dougal Culham, who also sits on the fire committee, would contact the manufacturer regarding the additional costs. Councillor Culham advised us that on April 25, 2008, he obtained the agreement of the manufacturer to reduce the cost of the additional items. On that same day, the manufacturer provided the Township with an updated invoice reflecting the reduced price.

The April 25, 2008 special meeting

- 16** The minutes of the April 25, 2008 special meeting indicate that it had been called ***“to discuss the invoice submitted ... dated April 25, 2008 for the additional items charged for the fire vehicle for the Township of Nipissing Fire Department.”***
- 17** At 7:20 p.m. on the evening of Friday, April 25, 2008, the Mayor convened the special meeting by initiating a series of individual sequential telephone calls. The meeting was not a teleconference; only the Mayor and one councillor were connected at any given time. One councillor described this as a “phone-around meeting.” The Mayor made separate calls to three councillors, updated them on the reduced invoice amount and obtained their agreement to the invoice. She did not contact the fourth councillor, who she believed was unavailable at that time.
- 18** According to the minutes, during the meeting the council resolved to ***“approve the additional items for the fire vehicle for the Township of Nipissing Fire Department in the total amount of \$2,511.60 including all applicable taxes ... as per Invoice No.5291 dated April 25, 2008.”*** This resolution was moved by Councillor Culham and seconded by Councillor Haufe.
- 19** According to the Mayor, the new invoice had to be approved immediately to ensure the scheduled delivery of the fire truck on the following Tuesday. She explained that this was why the meeting could not be postponed to a later date when the public could attend, and why no advance public notice was issued, or agenda posted.
- 20** On Monday April 28, 2008, a cheque was prepared by the municipality. It was given to the manufacturer’s representative the next day when the truck was delivered.

Did the April 25 telephone conversations amount to a “meeting”?

- 21** The Township did not deny that the serial telephone calls placed by the Mayor on April 25, 2008, constituted a meeting. During our investigation, the Mayor and two councillors referred to the calls as a “meeting.” While the third councillor who participated was unclear on this point, the minutes for April 25, 2008 refer to a “special meeting” of council having taken place and reflect that it was for the purpose of obtaining approval for the revised invoice.
- 22** The *Municipal Act, 2001* defines a meeting as *“any regular, special or other meeting of a council, of a local board or of a committee of either of them.”* Based on court decisions and the principles that inform the Act’s open meeting requirements, when deciding whether a council meeting has taken place, I consider whether members of council have come together *“for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority.”*

- 23** Following receipt of my preliminary investigative report, the council of the Township of Nipissing forwarded a copy of a legal opinion commenting on the results of my investigation. The opinion referenced the Ontario Court of Appeal decision in the case of *Southam Inv. v. the Regional Municipality of Hamilton-Wentworth*, [1988] O.J. No. 1684, and the following comment made by Justice Grange:

In the context of a statutory committee, “meeting” should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction.

- 24** Based on this quote, the Township’s legal opinion concluded, “the telephone poll of councillors – which the Mayor believed qualified as a meeting, was not a ‘meeting’ under the Act. However, the procedure runs contrary to [Nipissing’s] Procedural By-law.”
- 25** In the *Southam Inc.* case, the court considered whether an informal in-camera workshop attended by all but one member of a municipal standing committee qualified as a “meeting” under the municipality’s by-law, which required that committee meetings be held in public. After noting that the relevant by-law did not define the term “meeting” and referring to the *Black’s Law Dictionary* definition of the word, Justice Grange made the comment relied on by the Township’s counsel.
- 26** While Justice Grange’s remarks are instructive, I do not believe that they were intended to provide a comprehensive and exclusive definition of the term “meeting” as it appears in the *Municipal Act, 2001*. Rather, his comments appear to be focused on the specific context before him, in which an attempt had been made to superficially characterize a gathering of council members so as to remove it from the by-law requirements. He went on to state:

No matter how the meeting might be disguised by the use of terms such as “workshop,” or the failure to make a formal report, the committee members were meeting to discuss matters within their jurisdiction. What the committee was trying to do was to have a meeting in camera, something expressly forbidden under the by-law.

- 27** Justice Grange later observed, “when all members are summoned to a regularly scheduled meeting and there attempt to proceed in camera, they are defeating the intent and purpose of council’s by-law which governs their procedure.” Read as a whole, I do not take Justice Grange’s remarks as signifying that a meeting held through the means of sequential telephone calls during which council business is transacted could never constitute a “meeting” subject to the *Municipal Act* requirements. To find otherwise would encourage the very type of narrow definition of meeting and technical evasion of the open meeting requirements that Justice Grange was concerned about in the *Southam Inc.* case.
- 28** Municipal councils should not be able to circumvent the open meeting requirements through the use of electronic or telephone communication, in which not all parties are

communicating at the same time, but council business is nonetheless carried out in the absence of the public.

- 29** It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, “*for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority,*” may constitute a meeting.
- 30** In this case, participating council members exercised their authority through serial telephone conversations to approve the revised invoice. Consistent with the spirit and intent of the *Municipal Act, 2001*, I believe that it is clear that a meeting of council, subject to the open meeting requirements, took place.

Public notice of the special meeting

- 31** The *Municipal Act, 2001* requires that municipal procedure by-laws provide for public notice of meetings (s.238(2.1)). The Township’s procedure by-law states: “*Public notice of any meeting shall be posted on the bulletin board in the municipal office and the municipal web page and such notice shall include the date, time and location of such meeting. Such notice shall be posted at least twenty-four (24) hours prior to the said meeting, exclusive of business days.*”
- 32** The by-law also states that where a special meeting is called and it is not possible to provide the required notice, the clerk shall make reasonable efforts to provide notice to those concerned and the notice shall be posted as soon as is practicable after the meeting has been scheduled.
- 33** One of the primary purposes behind the notice requirement is to ensure that individuals wishing to attend an open meeting have an opportunity to do so, because they have been informed when and where it will be held. It is difficult to conceive of a situation when notice of a public meeting given after the fact would satisfy the intent of the Act. While emergencies may render normal notice procedures impractical, the municipality should make reasonable efforts to provide at least some form of prior notice. I believe that was what was also intended by the Township’s procedure by-law.
- 34** However, in this case, we found no evidence that notice of this special meeting had been issued by the township either before or after the meeting had been scheduled.
- 35** The Town clearly violated its own procedure by-law when it failed to give notice of the April 25, 2008 special meeting.

Resolution to go in camera

- 36** The Act and the Township’s procedure by-law both require that, prior to going in camera, council must state, by resolution, the fact of the holding of the meeting and the general nature of the matter to be considered at the closed meeting.
- 37** The Mayor has confirmed that no such resolution was passed during the special telephone conversation. However, such a resolution would not have been authorized in any event, since the subject matter of the meeting did not come within the exceptions allowing for “in-camera” discussion.

Public access to the special meeting

- 38** Both the *Municipal Act, 2001* and Nipissing’s procedure by-law require that all meetings be open to the public unless they fall within prescribed exceptions.
- 39** The purchase of a fire truck through public tender did not come within any of the exceptions to the open meeting requirements. Indeed, council had considered the first invoice in an open meeting on April 22, 2008. The council did not attempt to suggest that the invoice could have been considered in a closed meeting. However, as the Mayor acknowledged, the special meeting from a practical standpoint was effectively closed to the public.
- 40** Under the circumstances, it is clear that the April 25, 2008 special meeting of council was improperly closed to the public in violation of the provisions of the *Municipal Act, 2001* and the Township’s procedure by-law.

Opinion and Recommendations

- 41** Municipalities often need the flexibility to deal with urgent situations as they arise. The Mayor has confirmed that the April 25 telephone meeting was not the first conducted by council. She explained that council has, in the past, conducted similar telephone meetings where it believed that the subject matter needed to be dealt with as a matter of urgency. In this case, there is evidence that the council was genuinely concerned with approving the invoice expeditiously to ensure the scheduled delivery of the fire truck was not affected. Communicating through sequential telephone calls was also the fastest and easiest way to obtain approval for the invoice.
- 42** However, the need for quick communication does not relieve the council of its overriding responsibility to comply with the open meeting requirements. The council’s failure to provide notice of the April 25, 2008 special meeting, and the manner in which it was conducted, violated both the *Municipal Act, 2001* and the Township’s procedure by-law.

Expediency cannot be permitted to trump the public's right to a transparent and accountable process for the conduct of municipal business.

43 Accordingly, I am making the following recommendations:

Recommendation 1

The council of the Township of Nipissing should ensure that in future any special meetings, which are required by law to be open to the public, are conducted in a manner that ensures that they are accessible to the public. This includes immediately ceasing the practice of conducting “phone-around” meetings or other telephone meetings, which effectively exclude the public.

Recommendation 2

The council of the Township of Nipissing should ensure in future that notice of special meetings is given in all cases and that all reasonable attempts are made to give advance public notice of special meetings in accordance with the Township's procedure by-law.

44 In the course of our investigation, we also discovered an instance in which the Township's record-keeping practices were not in accordance with the statutory requirements. Subsection 239(7) of the *Municipal Act, 2001* requires that minutes of meetings refer to resolutions, “*decisions and other proceedings*.” Although a decision was made on April 22, 2008 to have a council member make further inquiries regarding the invoice for the fire truck, this was never formally recorded in the minutes. The council should ensure in future that all resolutions, decisions, directions and other proceedings are properly recorded.

Council Response

45 The council of the Township of Nipissing was provided with an opportunity to comment on my report and recommendations. In responding, the council expressed that it believed that the Mayor had acted in “good faith,” and noted that she had been faced with making an executive decision with a four-day deadline and had been unable to gather a quorum of councillors on such short notice. I do not question the good faith of the Mayor or council in this case. While the Mayor and council members may have addressed this matter with the best of intentions, this does not excuse them from compliance with the open meeting provisions.

46 I am encouraged by the fact that council ultimately accepted all of my recommendations. By doing so, council should be able to avoid similar situations of non-compliance with the open meeting requirements arising in future.

Report

- 47** The council of the Township of Nipissing is required to make this report public in accordance with s.14(2.6) of the *Ombudsman Act*.



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