



Ombudsman Report

**Investigation into
Council for the Township of
Black River-Matheson
closed meeting on September 2, 2014**

“Location, Location, Location”

**André Marin
Ombudsman of Ontario
November 2014**

Complaint

- 1 On September 4, 2014, my Office received a complaint about a closed meeting of the Committee of the Whole of Council for the Township of Black River-Matheson. The meeting was held on September 2, 2014.
- 2 According to the complainant, the location of the meeting was changed, and a portion of the meeting closed to the public, both without proper notice to the public.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, (the Act) all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, changes to the Act give 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.
- 5 My Office is the closed meeting investigator for the Township of Black River-Matheson.
- 6 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act and the relevant municipal procedure by-law have been observed.

Investigative process

- 7 On September 4, 2014, members of my Office's Open Meeting Law Enforcement Team (OMLET) advised the municipality that we would be investigating the complaint.
- 8 We considered the meeting documents, including the agenda and meeting minutes for the September 2 council meeting, the correspondence discussed in the closed portion of the meeting, the emails arranging for the closed portion, and the municipality's procedure by-law and relevant sections of the Act. We also spoke with the municipality's staff and interviewed certain members of council who were present at the meeting.
- 9 Members of council and staff co-operated fully during the course of our investigation.

- 10** Municipal elections were held on October 27, 2014. A new mayor was elected, along with five new councillors. Our investigation was completed before the new council took office.

Procedure by-law

- 11** The Township's procedural by-law (06-2011) states that regular meetings of Council and Committee of the Whole shall be held on the first and third Monday of every month at 6:30 p.m.
- 12** The by-law also states that meetings shall be held in council chambers at the township office (located in Matheson), or a place designated and used by council from time to time.
- 13** The by-law does not explicitly require notice to the public of regular or special meetings. However, it does provide that the approved schedule of regular council meetings and of the Committee of the Whole will be posted on the municipal bulletin board located in the township administration office.
- 14** The Clerk advised us that, in addition to posting the annual schedule of meetings on the bulletin board, the township's practice is to also post the schedule on the township's website.
- 15** The by-law does not require that agendas be posted in advance of a meeting. We were advised that, in practice, the meeting agenda is typically posted on the township's website at some point during the day on the Monday prior to the meeting.
- 16** Pursuant to the by-law, agendas may be amended at a meeting by a resolution of two-thirds of councillors present.

Meeting of September 2, 2014

Background

- 17** On March 31, 2014, the township's collective agreement with 15 of its non-managerial employees, who are represented by the Canadian Union of Public Employees (CUPE), expired.
- 18** As a result of failed negotiations, a lockout by the township commenced August 11, 2014.
- 19** On October 6, 2014, the lockout ended, and CUPE employees returned to work at the township.

Notice and Agenda

- 20** A regular meeting of the Committee of the Whole was scheduled for 6:30 p.m. on September 2, 2014. This meeting date was noted on the township's bulletin board and on its website.
- 21** An agenda package for the September 2, 2014 meeting was sent to council on the morning of August 27, 2014. The agenda noted the meeting's location as Vern Mill Memorial Community Arena in Matheson. This location differed from Council's usual meeting location at Council Chambers, as a result of an on-going legal issue and to accommodate anticipated higher public turnout, due to interest in the labour dispute.
- 22** The agenda did not state that there would be a closed portion of the meeting.
- 23** At approximately 1 p.m. on August 27, 2014, the Mayor (Mike Milinkovich), emailed the Clerk's office to indicate that he required a portion of the meeting on September 2, 2014 to be closed, in order to discuss labour relations with respect to an ongoing municipal employee labour dispute.
- 24** Early in the morning of August 28, 2014, the Clerk emailed all councillors to advise them of the Mayor's request for an addition to the agenda, to provide for a closed session under section 239(2)(d) to discuss the ongoing labour dispute.
- 25** According to the information we obtained, the agenda for the meeting, noting the arena location, was not posted on the bulletin board or the website.
- 26** However, a few members of the public who called the township to inquire about the meeting were told about the arena location by the remaining Township staff on duty.
- 27** We were advised that the failure to post the agenda in advance to the township website was related to the ongoing labour dispute, and the challenges faced by the few remaining employees to complete all necessary municipal staff work.

The closed meeting discussions

- 28** The closed meeting minutes show that, at the outset of the open meeting at 6:30 p.m., two councillors moved to approve an amended agenda, which was approved unanimously, in accordance with the township's procedure by-law.

- 29** Council then passed a resolution to go *in camera* at 6:35 p.m., in accordance with section 239(2)(d) of the Act for discussion of a labour relations matter, specifying the general nature of the meeting to be “union negotiations.”
- 30** The closed meeting minutes were otherwise sparse, and did not record details of the closed meeting discussions, nor does the township electronically record its closed or open sessions. However, based on interviews, our Office was able to determine that the closed discussion related to the ongoing CUPE lockout.
- 31** All individuals interviewed confirmed that the Mayor initially discussed a meeting that was held to establish a strike protocol. He also addressed various interactions that councillors reported having with striking employees, and council’s strategy moving forward with the labour dispute. Additionally, the Mayor discussed an offer from a member of the public to facilitate resolution of the labour dispute.
- 32** We were also told that the Director of Public Works provided additional information on the strike protocol meeting, which he had attended, and provided his view on councillors’ interactions with striking employees.
- 33** Witnesses told us that most of the closed session was subsequently taken up with the chief negotiator’s update on the status of negotiations with the union, and detailing options available to council. The negotiator was directed to extend an invitation to the union to meet.
- 34** The *in camera* portion of the meeting concluded at 7:24 p.m.
- 35** At the open session, some members of the public who had learned of the changed meeting location by telephoning the township or by word of mouth were present. However, council did not report back on the matters discussed *in camera*. The open session concluded at 7:43.
- 36** According to the information we obtained, council’s next meeting (September 15) was also held at the arena. Once again, no advance notice of this change of location was posted, but some members of the public did attend this meeting as well, having learned of the location through word of mouth or calling the township.
- 37** Council has since resumed holding its meetings at Council Chambers, and posting agendas online in advance of meetings.

Analysis

Application of the labour relations/employee negotiations exception

- 38** Under the Act, council is permitted to discuss matters pertaining to labour relations and employee negotiations (s. 239(2)(d)) in closed session.
- 39** As I noted in my November 2013 report on closed meetings of the Township of Leeds and Thousand Islands, while there are no reported court cases interpreting the “labour relations or employee negotiations” exception in the Act, some guidance is provided in decisions in freedom of information cases (despite these not being binding on my Office).¹
- 40** According to the Information and Privacy Commission, the term “labour relation” refers to the collective bargaining relationship between an institution and its employees (IPC Order PO-2613).
- 41** The discussions held *in camera* on September 2, 2014 clearly came within the exception carved out by s. 239(2)(d), as they related to the ongoing labour dispute between the municipality and its unionized employees.
- 42** Although the exception is discretionary in nature, council was permitted to discuss the ongoing labour dispute behind closed doors.

Notice to the public

- 43** Section 238(2) of the Act requires that a procedure by-law provide for notice to the public of all meetings. However, the Act does not specify the content of the notice to be given to the public.
- 44** My Office has noted on numerous occasions that notice should include adequate, meaningful information about all open and closed portions of a meeting.²

¹ Ombudsman Ontario, *Investigation into Whether Members of Council for the Township of Leeds and the Thousand Islands Held Improper Closed Meetings on November 16, 2012 and February 19, 2013*, November 2013: https://ombudsman.on.ca/Files/sitemedia/Images/Reports/TLTI-Nov13-Final-EN_1.pdf

² See my Office’s *Sunshine Law Handbook*, 2nd Ed., p.19 (<https://ombudsman.on.ca/Resources/Sunshine-Law-Handbook.aspx>) and December 2010 report, *Investigation into Whether the Town of Mattawa Council and its Ad Hoc Heritage Committee Held Improperly Closed Meetings* (<https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>)

- 45** A reasonable interpretation of what constitutes adequate “notice” includes the time, date and location at which a meeting will take place.
- 46** This interpretation is informed by similar legislative provisions with respect to notice, such as that contained in the *Business Corporations Act*, R.S.O. 1990, c.B.16, which requires that notice of shareholders’ meeting include notice of the time and place of the meeting be provided (s. 96), or the *Education Act*, R.S.O. 1990, c.E.2, providing that notice of certain meetings must provide a clear statement of the date, time and place of the meeting. (s. 62(6), s. 90(1)), or the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, which provides that notice of an oral hearing shall include the time and place of the hearing (s. 6(3)).
- 47** It is also informed by the principles underpinning the open meeting laws; that is, the public’s “right to observe municipal government in process.”³ Without notice of where the meeting will take place, the public is effectively denied this right.
- 48** The time and date of the September 2, 2014 meeting was posted in the annual meeting schedule on the township’s website and bulletin board, but members of the public were not made aware of the change in location of the meeting. This is because the agenda, the only document advising of the changed location, was distributed only to council members.
- 49** Although the lack of public notice appears to have been an oversight related to the impact of staff shortages and the ongoing labour dispute, given that the public was denied notice of the meeting’s location, council’s closed session on September 2, 2014 technically violated the *Municipal Act*.

Procedure by-law

- 50** In reviewing the township’s procedure by-law, we noted that it does not explicitly provide for notice to the public of regular or special meetings. According to s. 238(2) of the Act, the by-law must provide for notice to the public of all meetings.
- 51** We also noted that the procedure by-law states that the matters covered by the exceptions to the open meeting laws must be discussed *in camera*. This suggestion that consideration of such issues in closed session is mandatory contradicts the provisions of the Act.

³ *London (City) v. RSJ Holdings Inc.* [2007], 2 SCR 588 at para. 32.

- 52** In fact, council always has the discretion to consider these topics in open session. Only matters falling under the s. 239 (3) – relating to requests under the *Municipal Freedom of Information and Protection of Privacy Act* – must be discussed in camera.
- 53** Accordingly, I am making seven recommendations for council to improve its procedure by-law and its closed meeting practices.

Opinion

- 54** Our investigation established that the in-camera portion of the meeting of the Committee of the Whole for the Township of Black River-Matheson on September 2, 2014 was permitted to be held in closed session under the exceptions to the *Municipal Act*. Nevertheless, the September 2 meeting was still in violation of the open meeting requirements of the Act because public notice of the changed location of the meeting was not provided.

Recommendations

- 55** Although the makeup of council has changed since the election on October 27, 2014, my recommendations apply equally to the newly elected council, and I trust it will follow up on them in the new term.

Recommendation 1

The Township of Black River-Matheson should amend its procedure by-law to explicitly provide for notice to the public of regular and special meetings.

Recommendation 2

The Township of Black River-Matheson should amend its procedure by-law to reflect the discretionary nature of the majority of the exceptions to the open meeting requirements.

Recommendation 3

The Township of Black River-Matheson should ensure that its notice to the public of regular and special meetings include relevant information about the date, time and location of the meeting.

Recommendation 4

The Township of Black River-Matheson should report back in public session, on at least the general nature of matters discussed *in camera*, providing as much detail as the subject matter permits.

Recommendation 5

The Township of Black River-Matheson should ensure that it posts the agenda for regular and special meetings of Council and of the Committee of the Whole in advance of the meeting, and that any items arising after an agenda is posted be included in a revised agenda, which is also publicly posted.

Recommendation 6

The Township of Black-River Matheson should improve its written record of its meetings, and, consistent with s.239(7) of the Act, a written record of a closed meeting should ideally include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and all votes taken, and all directions given.

Recommendation 7

In the interests of transparency and accountability, the Township of Black River-Matheson should record audio and/or video of all in camera meetings and store such recordings in a confidential and secure fashion for future reference.

Report

- 56** Staff from my Office spoke with the Clerk, the new mayor-elect, Mr. Garry Edwards, and the outgoing mayor, Mr. Milinkovich on November 24, 2014 to provide an overview of these findings, and to give the municipality an opportunity to comment. Their comments were taken into account in preparing this report.
- 57** My report should be shared with council and made available to the public as soon as possible, and no later than the next regular council meeting of January 19, 2015.



André Marin
Ombudsman