



Ombudsman Report

**Investigation into whether
Council for the Town of Cochrane
held an illegal closed meeting on
February 12, 2013**

**André Marin
Ombudsman of Ontario
December 2014**

Complaint

- 1** On August 28, 2014, my Office received a complaint about a closed session held by council for the Town of Cochrane on February 12, 2013.
- 2** According to the complaint, the closed session discussions that took place that day did not fit within any of the exceptions to the open meeting requirements outlined in the *Municipal Act, 2001* (the Act) and should have taken place in open session.

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, 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.
- 5** The Ombudsman is the closed meeting investigator for the Town of Cochrane.
- 6** In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

The 2014 municipal election

- 7** The municipal election was held on October 27, 2014, while our investigation was ongoing. Mayor Peter Politis was re-elected, as were two other members of council. The remaining four council positions were filled by new members.
- 8** In this report, all mentions of the Mayor and council refer to the council as it stood on February 12, 2013.

Investigative process

- 9** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law (by-law 289-2003)

and the Act, as well as the meeting materials for the February 12, 2013 meeting. They also spoke with municipal staff and members of council.

- 10** My Office received full co-operation in this matter.

Council procedures

- 11** The town's procedure by-law states that meetings will be open to the public, except as provided for in the by-law. Section 11 of the by-law outlines the subjects that can be discussed in closed session, and mirrors section 239 of the Act.
- 12** The procedure by-law states that, prior to proceeding in camera, council shall state by resolution:
- a. that the meeting is closed to the public;
 - b. the general nature of the subject matter to be considered in the closed meeting;
 - c. the time in which Council constituted themselves in closed session;
 - d. the officers or personnel, if any, that are authorized to remain with Council in closed session.
- 13** Section 11.8 of the by-law states that no minutes will be recorded of closed sessions, with the exception of the motions to come out of the closed session.
- 14** This section of the procedure by-law is contrary to the requirements of the *Municipal Act*, which states:
- 15** 239(7) A municipality...shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.
- 16** Although it appears that the town does in fact follow a practice of keeping closed session minutes, the procedure by-law should be amended to reflect this practice, and to reflect the requirements of the Act.

The February 12, 2013 meeting

- 17** The February 12 meeting was a Committee of the Whole meeting that began at 6:00 p.m. Notice of the meeting was provided by posting the agenda on the municipal website and in Town Hall, in accordance with the usual practice.

- 18** The agenda indicated that a closed session would be held to discuss “Property and Personnel Matters.” The minutes indicate that council passed a resolution to move into closed session at 6:36 p.m. for these same reasons.
- 19** While in camera, council discussed a matter pertaining to a contract with a named individual. Under this item, council reviewed a confidential staff report, which outlined concerns about this individual and suggested the contract should not be renewed.
- 20** When council reconvened into open session, it voted not to renew the contract.

Analysis

The Meeting

- 21** The information provided to my Office indicates that the in-camera discussions on February 12, 2013 pertained to discussions of the Town’s contract with an identified individual.
- 22** When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on my Office, these cases can be informative.
- 23** IPC Order MO-2204¹ noted that, in order to qualify as “personal information,” the information must be about an individual in their personal capacity, rather than their professional, official or business capacity. However, information in a professional capacity may qualify as personal information if it reveals something of a personal nature about the individual. Information about a person in their professional capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct (IPC Order MO-2519²).
- 24** In this case, council was scrutinizing the conduct and questioning the credibility of an individual who was under contract with the town. These discussions fit within the “personal matters” exception.

Procedural matters

Resolution to proceed in camera

- 25** Section 239(4) of the Act requires that, prior to proceeding into closed session, council must state by resolution the fact of holding the meeting, and the

¹ Order MO-2204, Town of Aylmer (June 22, 2007).

² Order MO-2519, Township of Madawaska Valley (April 29, 2010).

general nature of the subject matter to be considered. This is also reflected in the town's own procedure by-law.

- 26** As noted by the Ontario 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.”
- 27** On February 12, 2013, council proceeded in camera to discuss “property and personnel matters.” We were unable to obtain clear information regarding what “property” matter was under consideration, and neither of these items specifically refers to an exception outlined in s. 239 of the Act.
- 28** Unless council is considering a matter under the “education or training” exception, it is not a requirement of the Act to cite the specific exception authorizing a closed session discussion. However, it is a best practice to do so to ensure that the public has a clear idea why council is proceeding in camera.
- 29** Furthermore, in order to fulfill its obligations under the Act and its own procedure by-law, council should provide a general description of the subject matter to be discussed in closed session.
- 30** From the evidence we obtained during this investigation, it is not clear that all of the discussions during the in-camera meeting on February 12, 2013 were captured in the minutes. Two witnesses provided contrary information regarding what “property” matter may have been discussed in camera, and no discussion regarding property was captured in the in camera minutes. The town should ensure that comprehensive meeting records, which include all substantive discussions, are kept for both open and closed meetings.

Meeting record

- 31** As noted in my 2011-2012 OMLET Annual Report, I also encourage municipalities to make audio or video recordings of council proceedings. This provides the clearest, most accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings. Several municipalities, including the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Municipality of Lambton Shores and the City of Oshawa, already follow this practice.
- 32** In this case, a complaint was received a year and a half after the meeting occurred. Understandably, the memories of those involved had faded. An audio recording of the closed session would have greatly assisted my staff in conducting a timely review of the complaint.

³ [2007] O.J. No. 919, at page 151

Opinion

- 33** My investigation established that council for the Town of Cochrane did not contravene the *Municipal Act, 2001* during the February 12, 2013 closed session. The discussions that took place fell within the “personal matters” exception to the open meeting requirements.
- 34** However, I am making the following recommendations that I hope will help council improve the transparency of its closed meetings.

Recommendations

Recommendation 1

The Town of Cochrane should amend its procedure by-law to reflect the requirement of the *Municipal Act, 2001*, that a record be kept of closed session meetings.

Recommendation 2

The Town of Cochrane should ensure that its resolutions to proceed in camera 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.

Recommendation 3

The Town of Cochrane should consider implementing a practice of audio or video recording its closed sessions.

Report

- 35** OMLET staff spoke with XXX on XXX to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 36** My report should be shared with council for the Town of Cochrane and made available to the public as soon as possible, and no later than the next council meeting.



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