Ombudsman Report

Investigation into whether Council for the Township of McMurrich/Monteith held illegal meetings on January 12 and 19, and February 9, 2015

André Marin
Ombudsman of Ontario
June 2015

Complaint

1 On January 20, 2015, my Office received a complaint about closed meetings held by council for the Township of McMurrich/Monteith on January 12 and January 19, 2015. On February 12, we received a complaint about closed meetings held by the council on January 12, 19, and February 9, 2015. The complaints are addressed together in this report.

2 According to the complainants, the meeting agendas for the three meetings did not provide enough detail about the topics to be discussed in closed session. The complainants told us the resolutions passed by council to proceed in closed session also failed to disclose enough meaningful information to the public, and that the exceptions cited in the resolutions did not match those listed in the agendas.

3 Further, one complainant alleged that a matter discussed in closed session on January 19 did not fall within one of the permitted exceptions to the open meeting rules.

4 The complainants also told our office that council violated its 11 p.m. curfew on January 12 when it continued in closed session until 11:07 p.m.

Ombudsman jurisdiction

5 Under the *Municipal Act, 2001* [the Act][1], all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.

6 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.

7 The Ombudsman is the closed meeting investigator for the Township of McMurrich/Monteith.

8 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

[1] *Municipal Act, 2001*, S.O. 2001, c.25.

Previous complaints

9 Previously, my Office found that council for the Township of McMurrich/Monteith held an illegal closed meeting on May 7, 2013, when it discussed reimbursing councillor expenses in closed session. The subject matter of the discussion did not fit within any of the exceptions to the open meeting requirements. I also found that the resolution to proceed in camera did not include enough meaningful information regarding the matters to be considered.

10 Based on that review, I recommended that council provide more detail about the general nature of the matters being considered in a closed session. I provided an example of a resolution that properly cites the applicable exception in the Act and includes information about the discussion that would be meaningful for the public.

11 I also recommended that, as a best practice, council consider audio recording meetings. Since my report was issued, the township has implemented an audio recording policy for all council meetings, including closed sessions.

The 2014 municipal election

12 The municipal election was held on October 27, 2014. Only one member of the previous council was re-elected. The new council was sworn in on December 1, 2014.

Investigative process

13 On March 9, 2015, after completing a preliminary review, my Office advised council we would be investigating this complaint.

14 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township's procedural by-law and the Act, and relevant meeting agendas and minutes. They spoke with the Reeve and the Clerk. They also reviewed audio recordings of the closed sessions, which provided an accurate record of what transpired and greatly assisted us in completing our investigation.

15 My Office received full co-operation in this matter.

Council procedure

16 While the Municipal Act does not specify how notice of meetings must be provided to the public, it does state that every municipality must pass a procedure by-law that provides for public notice of meetings.

17 Section 5.1(2) of the Township's Procedural By-Law (13-2013) requires the agenda for a regular meeting to be posted on the township office's bulletin board at least 48 hours before the meeting.

18 The by-law does not provide for public notice of special meetings.

19 Section 7 of the by-law sets out the content of the agendas, including the order in which items should appear. "Closed session" is the 14th item on the list. The by-law does not require any specific content to be included in the agenda.

20 Section 3.3 of the by-law states that meetings may be closed to the public if the subject matter being considered relates to one of the exceptions in s. 239(2) of the Municipal Act.

21 Before closing a meeting to the public, section 3.4 of the by-law requires council state by resolution the fact it will be holding a closed session and the general nature of the matter to be considered.

22 Section 17 of the by-law requires all council or committee meetings adjourn by 11 p.m., unless a member has the floor or a vote is being taken. Council can extend the time for a meeting by way of a two-thirds majority vote.

23 Section 3.5 restricts voting in closed session to situations where council is giving procedural directions to staff or a person retained by the township.

January 12, 2015 meeting

24 On January 12, 2015, at 7:30 p.m., council for McMurrich/Monteith held a regular council meeting at the township office. The Reeve and all four councillors were present, as well as the Clerk/Treasurer, Deputy Clerk/Treasurer, Custodian, Roads Foreman, and members of the public.

25 We received a complaint that the January 12 agenda and resolution to proceed into closed session did not disclose enough meaningful information to the public, and that the agenda and the resolution each cite different sections of the Municipal Act.

Both complainants also told us that the closed session continued past the 11:00 p.m. curfew specified in the township's procedure by-law.

Meeting agenda and resolution to proceed into closed session

26 Item 15 on the agenda for the township's regular council meeting on January 12, 2015 was a closed session to consider legal advice. The agenda referred to "section 239 – section 6".

27 According to the open session minutes, council passed a resolution to proceed in camera at 10:45 p.m. to discuss advice that is subject to solicitor-client privilege pursuant to section 239(2)(e) of the Act, and employee matters under section 239(2)(d) of the Act.

Discussion in closed session

28 We reviewed the audio recording of the closed session and confirmed the content with the Reeve and the Clerk.

29 Council first discussed unauthorized alterations being made to an unopened road allowance (a strip of crown land reserved for future road development) in the township by an individual. Council had sought legal advice on the matter and the discussion in closed session focused on the written legal advice it had received. Council members discussed options they could take to enforce the applicable by-law, in accordance with the legal advice.

30 Council then discussed a matter relating to the health and safety of a township employee, concerning the safety of the employee during performance of her regular duties.

31 The closed session adjourned at 11:07 p.m.

Extending past curfew

32 The January 12 closed session continued past the 11:00 p.m. curfew.

33 According to the Clerk and Reeve, no council member had the floor when the meeting went past curfew, and no vote was taken to extend the meeting. They told us that they just didn't notice the time.

Analysis

The agenda

34 McMurrich/Monteith's procedure by-law sets out the subjects that should be listed on agendas, including the order in which items should appear. "Closed session" is the 14th item on the list. The by-law does not require any specific content to be included in the agenda.

35 McMurrich/Monteith's agenda for the regular council meeting on January 12 indicated there would be a closed session to discuss "section 239 - section 6 - If Required - Legal Advice Received". We were advised that the reference to "section 6" was an error and would be removed from the standard agenda template.

36 With respect to the closed session, the agenda indicates only that legal advice will be discussed, whereas the minutes reference both solicitor-client privilege and employee matters. We were advised that an employee health and safety matter was raised during the open session and subsequently included in closed session under "employee matters".

37 As a best practice, whenever possible, municipalities are encouraged to make an agenda available to the public, listing the subjects to be discussed and a general description of each matter. This applies to both open and closed sessions.

The resolution

38 There were technical errors in the resolution to go into closed session. The resolution erroneously cited subsection 239(2)(e) of the Act in reference to solicitor-client privilege. Subsection (e) is for matters related to litigation or potential litigation, whereas subsection (f) is for matters related to advice that is subject to solicitor-client privilege. To avoid confusion, council should ensure that the correct section of the Act is cited.

39 More concerning, the resolution to proceed in camera stated that a closed session would be held to discuss advice that is subject to solicitor-client privilege and employee matters, but failed to provide meaningful information to the public about the issues to be discussed. We were advised that this is council's usual practice when passing a resolution to proceed in camera.

40 The Act requires municipalities, before holding a closed meeting, state "the fact of holding a closed meeting and the general nature of the matter to be considered at the closed meeting".[2] This requirement is echoed in section 3.4 of the township's procedure by-law.

41 As the Ontario Court of Appeal noted in *Farber v. Kingston (City)*[3],

> "[T]he 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."

Applicability of the "solicitor-client privilege" exception

42 My Office considered whether the exception for "advice that is subject to solicitor-client privilege, including communications necessary for that purpose" in s. 239(2)(f) of the Act applied to the discussions held in closed session. Council was discussing a letter containing confidential advice from legal counsel. Accordingly, the discussion fell within the exception contained in s. 239(2)(f).

Applicability of the "labour relations and employee negotiations" exception

43 My Office also considered whether the discussion in closed session pertained to "labour relations and employee negotiations" for the purposes of s. 239(2)(d) of the Act. The information provided to my Office indicates that the discussion was about an employee health and safety matter. Councillors had expressed concern about the safety of a staff person with respect to one of their regular duties and considered possible alternatives.

44 In 2003, the Ontario Court of Appeal found that the meaning of "labour relations" can extend to the relations and conditions of work, beyond those related to collective bargaining.[4] Similarly, in 2014, the Office of the Information and Privacy Commissioner clarified that "labour relations" can apply to relationships outside a strict collective bargaining relationship, as long as they are analogous to those governed by collective bargaining legislation.[5]

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[2] *Municipal Act, 2001*, s. 239(4)(a).
[3] 2007 ONCA 173, 2007 CarswellOnt 1473, 156 A.C.W.S. (3d) 463, 222 O.A.C. 32, 279 D.L.R. (4th) 409, 31 M.P.L.R. (4th) 31.

[4] Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner), 2003 CarswellOnt 4071, [2003] O.J. No. 4123, 126 A.C.W.S. (3d) 185, 178 O.A.C. 171. See also IPC Order PO-3311 (2014); and IPC Order PO-3311 (2014).
[5] IPC Order MO-2997, [2014] O.I.P.C. No. 5. See also IPC Order PO-2057 [2002].

45 As the discussion pertained to the conditions of work of a township employee, it fit within the exception contained in s. 239(2)(d).

Extending past curfew

46 Section 17 of the township's procedure by-law requires all council or committee meetings to adjourn by 11 p.m., unless a member has the floor or a vote is being taken. Council can extend the time for a meeting by way of a two-thirds majority vote, but section 3.5 of the procedure by-law restricts votes in closed sessions to giving procedural directions to staff. Therefore, in order to extend a meeting in closed session past the 11 p.m. curfew, council is required to come out of closed session to vote on extending the meeting before going back into closed session.

47 On January 12, council violated their procedure by-law by failing to follow proper procedure for extending a meeting.

January 19, 2015 meeting

48 On January 19, 2015, at 7:30 pm, council for McMurrich/Monteith held a special council meeting at the Sprucedale Community Centre. The Reeve and all four councillors were present, as well as the Clerk/Treasurer, Deputy Clerk/Treasurer, Roads Foreman, and members of the public.

49 We received a complaint that council failed to provide sufficient detail regarding the subject matter of the closed session discussion on the agenda and in the resolution to go into closed session. Further, the complainants allege that council improperly discussed a schoolhouse lease in closed session.

Meeting agenda and resolution to proceed into closed session

50 Item 15 on the agenda was a closed session to discuss legal advice.

51 According to the open session minutes, council passed a resolution to proceed in camera to discuss advice that is subject to solicitor-client privilege and employee matters, pertaining to the unopened road allowance and lease agreement, as well as identifiable individuals.

Discussion in closed session

52 We reviewed the audio recording of the closed session and confirmed the content with the Reeve and the Clerk.

53 During the closed session, council discussed written legal advice it had received about an individual removing trees from an unopened road allowance. This was a continuation of the discussion during the January 12 closed session. Council also discussed potential legal options with respect to the logger's activity. Council then directed the municipality's Roads Foreman to take steps to address the situation.

54 Council then discussed legal advice received in writing with respect to liability concerns associated with a lease agreement held by a local seniors group.

Analysis

The agenda

55 The township's procedure by-law provides for public notice of regular meetings, but does not provide for public notice of special meetings, such as the one held on January 19, 2015.

56 As noted above, the Act requires municipalities to provide for public notice of meetings in their procedure by-law. McMurrich/Monteith should revisit its procedure by-law to ensure that it complies with the requirement in the Act by providing for public notice of all meetings, including special meetings.

57 McMurrich/Monteith's agenda for January 19 notes that a closed session would take place, but does not provide any details regarding the subject matter to be discussed. The agenda also incorrectly cites section 239(6) of the Act, as noted above with respect to January 12.

58 With respect to the closed session, the agenda only indicates that legal advice will be discussed, whereas the resolution to go into closed session cites three exceptions to the open meeting requirements: Legal advice, employee matters, and identifiable individuals.

59 The Act does not specify the content of public notice provided before a meeting, and this is not addressed by the township's procedure by-law.

60 As a best practice, municipalities are encouraged to include information about the general nature of the matter(s) to be discussed on their agendas. Providing public

notice about matters to be discussed during a closed session makes the notice meaningful to citizens, increases transparency, and facilitates public participation.

The resolution

61 The resolution passed to go in closed session on January 19 cites three exceptions: Solicitor-client privilege, employee matters, and identifiable individuals, and states that council will discuss the unopened road allowance and a lease agreement. The resolution does not indicate which exception in the Act applies to which of the named subject matters. As a result, it is not clear whether the three cited exceptions applied to both the road allowance and the lease agreement discussion, or only certain exceptions applied to each of the two matters.

62 As a best practice, council should clarify in its resolutions which exception applies to which subject of discussion.

Applicability of the "solicitor-client privilege" exception

63 My Office considered whether the exception for "advice that is subject to solicitor-client privilege, including communications necessary for that purpose" in s. 239(2)(f) of the Act applied to the discussions held in closed session. Council discussed a letter containing confidential advice from legal counsel on two matters: Activity on an unopened road allowance and liability related to a schoolhouse lease agreement. Accordingly, these discussions were appropriately closed under s. 239(2)(f).

Applicability of the "acquisition or disposition of land" exception

64 Although the township did not cite section 239(2)(c) of the Act, the discussion regarding the lease agreement could also have fit within this exception, as it related to the acquisition or disposition of land.

65 The Information and Privacy Commissioner has considered the meaning of the words "acquisition" or "disposition" in section 207(2)(c) of the *Education Act* and found that both of these words can be used to "relate to the purchase, sale, lease or other similar transfer of rights of use of the property, land and/or premises".[6]

[6] Information and Privacy Commissioner of Ontario, Order MO-1558-I (25 July 2002).

Applicability of the "personal matters about an identifiable individual" exception

66 My Office also considered whether the discussion in closed session pertained to "personal matters about an identifiable individual, including municipal or local board employees" for the purposes of s. 239(2)(b) of the Act.

67 The information provided to my Office indicates that council was discussing an identified member of the public and their potential violation of a local by-law.

68 Accordingly, the discussion fit within the exception for personal matters about an identifiable individual.

Applicability of the "labour relations or employee negotiations" exception

69 The information provided during my investigation indicated that any discussion of employees that took place during this closed session was limited to directions from council to an employee. Council directed the Roads Foreman to take steps to address unauthorized activity on an unopened road allowance. The directions were within the scope of the employee's official duties.

70 The Ontario Information and Privacy Commissioner has defined "labour relations" as referring to:

> [M]atters arising out of the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation. 'Labour relations' matters are distinct from "employment-related" matters, which may cover human resources or staff relations issues that do not arise out of a collective bargaining relationship.[7]

71 According to the Commission, "labour relations information" can include things like the negotiation of pay equity plans,[8] and reviews of the effects of a strike on operations.[9] The Commission has found that the names, duties, and qualifications of individual employees does not constitute labour relations information because, "it does not relate to labour disputes, labour negotiations or other similar information".[10]

72 The fact that a township employee attended the meeting and participated in the discussion in his official capacity does not automatically make the discussion fall under the labour relations or employee negotiations exception. This exception did not apply to the January 19 closed session discussion.

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[7] IPC Order PO-2157 (2003).
[8] IPC Order P-653 (1994)
[9] IPC Order PO-2157 (2003) at 4.
[10] IPC Order MO-2164.

February 9, 2015 meeting

73 On February 9, 2015, at 7:30 p.m., council for McMurrich/Monteith held a special council meeting at the township office. All four councillors were present, as well as the Clerk/Treasurer, Deputy Clerk/Treasurer, and members of the public. The Reeve arrived late to the meeting after attending an earlier Planning Board meeting.

74 We received a complaint that council failed to provide sufficient detail regarding the subject matter of the discussion on the agenda and in the resolution to go into closed session.

Meeting agenda and resolution to proceed into closed session

75 Item 15 on the agenda for the meeting stated that there would be a closed session, but no further details were provided.

76 According to the open session minutes, council passed a resolution to amend the agenda to include a closed session related to an identifiable individual. Council then resolved to proceed in camera at 8:13 p.m.

Discussion in closed session

77 We listened to the audio recordings of the closed session, reviewed the closed session minutes, and confirmed the content with the Clerk and Reeve.

78 During the closed session, council discussed allegations of fraud at the township that had been publicly circulated, which had implicated an individual without naming that person outright. Council named the implicated individual and discussed that person's feelings in response to the allegations. They also discussed potential courses of action open to council to respond to the incident.

Analysis

The agenda

79 The agenda for February 9 does list a closed meeting, but no exception is cited and no subject matter is indicated.

80 The Clerk told our office that she includes this general reference to a closed session as a matter of course in every agenda, and adds details when she knows council plans to hold a closed session. She told us that she learned that council needed to hold a closed session immediately prior to the meeting on February 9, so she did not have time to include the applicable exception or information about the subject of the discussion on the agenda.

81 As noted above, the town's procedure by-law requires only that notice of a meeting be provided to the public. However, municipalities are encouraged to include information about closed sessions on agendas as a best practice, including an indication of the exception to be cited and the subjects to be considered.

The resolution

82 The resolution to go into closed session on February 9 references section 239 of the Act and refers to an "identifiable individual". It does not cite a subsection of the Act. No information is provided with respect to the general nature of the subject matter to be discussed.

83 As noted above, the Act requires the resolution to go into a closed session to state the fact of a closed session and the general nature of the matter to be considered.

84 In this case, the resolution failed to provide any information with respect to the nature of the matter to be considered.

Applicability of the "personal matters about an identifiable individual" exception

85 During the closed session, council members discussed public allegations of wrongdoing about a township employee. Council's discussion went beyond the information that had already been made public. They named the individual implicated by the allegations and discussed information about the individual's response to the allegations, which had been communicated to members of council in confidence. Council also discussed potential law enforcement options to respond to the allegations.

86 The Act does not define "personal matters" for the purposes of the open meeting rules. However, as I found in my 2013 investigation into a complaint about a closed meeting held by council for the City of Timmins,[11] information about an investigation or assessment of alleged misconduct, including alleged violation of a municipal by-law, can be considered "personal".

87 The Information and Privacy Commissioner has made findings regarding the interpretation of "personal" with respect to information. The Commissioner has found that information about an individual in their professional capacity can still be considered "personal" if it reveals something inherently personal about them.[12]

88 Section 14(3)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* states that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information… was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

89 In accordance with these interpretations of what constitutes a "personal matter", the discussion in closed session on February 9 was limited to personal matters about an identifiable individual. The discussion went beyond information about the individual in their professional capacity.

Opinion

90 The closed session discussions held by council for the Township of McMurrich/Monteith on January 12, January 19, and February 9 fell within the exceptions listed in the *Municipal Act, 2001*, and as such did not violate the open meeting rules.

91 However, council did violate section 239(4)(a) of the *Municipal Act, 2001* by failing to state by resolution the general nature of the matter to be considered at closed meetings on January 12 and February 9, 2015.

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[11] Available online: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/Timmins-closing-letter-June-17-mtg--Nov-14-a.pdf>.

[12] IPC Order PO-2225.

92 Further, council violated its procedure by-law by allowing a meeting to continue past the 11:00 p.m. curfew without passing a resolution to extend the meeting.

93 Council is also not following best practices by failing to provide sufficient information about matters to be considered during closed sessions in its agendas, and by failing to ensure that agendas and resolutions accurately cite the Act.

94 I make the following recommendations to assist the township in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendations

95 I make the following recommendations to assist council for the Township of McMurrich/Monteith to improve its practices with respect to open meetings:

Recommendation 1:
In accordance with the *Municipal Act, 2001*, council for McMurrich/Monteith should provide as much information as possible about the general nature of the matters to be considered in its resolutions to go into a closed meeting, without compromising the reason for holding a closed meeting.

Recommendation 2:
In accordance with the Act, McMurrich/Monteith should amend its procedure by-law to provide for public notice of all meetings, including special meetings.

Recommendation 3:
As a best practice, council for McMurrich/Monteith should provide as much information as possible in its meeting agendas about the general nature of the matters to be considered in a closed meeting without compromising the reason for holding a closed meeting.

Recommendation 4:
Council for McMurrich/Monteith should take care to cite only the exceptions in the Act that apply to the discussion in closed session.

Recommendation 5:
Council for McMurrich/Monteith should take care to cite the applicable sections of the Act accurately, including by referencing the correct provisions and referring to the applicable exceptions using the same wording in the Act.

Recommendation 6:
Council for McMurrich/Monteith should observe the curfew set out in its procedure by-law or follow the stated procedure to extend a meeting.

Report

96 OMLET staff spoke with the Clerk and Reeve on June 2, 2015 to provide an overview of these findings and to give council an opportunity to comment. Their comments were taken into account in preparing this report.

97 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.

André Marin
Ombudsman of Ontario