



Ombudsman Report

**Investigation into a complaint about a
meeting held by Council for the Town of
Grimsby on May 2, 2016**

**Paul Dubé
Ontario Ombudsman
November 2016**

Complaint

- 1 My Office received a complaint that council for the Town of Grimsby discussed a municipally-controlled corporation, Niagara Power Inc., in camera on May 2, 2016 contrary to the open meeting rules. The complainant alleged that the subject matter discussed did not fall within any of the prescribed exceptions in the *Municipal Act, 2001* (the Act).
- 2 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.

Ombudsman jurisdiction

- 3 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing 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.
- 4 The Ombudsman is the closed meeting investigator for the Town of Grimsby.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Investigative process

- 6 We notified the town that we would be investigating this complaint on June 29, 2016. My Office's Open Meeting Law Enforcement Team (OMLET) obtained and reviewed the town's procedure by-law and relevant meeting materials, including the agenda, minutes, and closed session minutes for the May 2, 2016 meeting. We interviewed the Mayor and all members of council, as well as the Clerk and the Town Manager.
- 7 My Office received full co-operation in this matter.

Council procedures

- 8 By-law 07-81, passed in November 2007, governs the proceedings of council, local board and committee meetings. Other than a minor amendment in 2012, the by-law has not been updated since it was passed.
- 9 The by-law states the requirement for council to state by resolution the fact of a closed meeting and the general nature of the subject matter to be discussed prior to holding a closed meeting. It lists the discretionary exceptions as set out in section 239(2) and 239(3.1) of the Act.
- 10 The by-law does not make reference to the mandatory exception in the Act for discussions about an *MFIPPA* request where the municipality is the head, or the new mandatory exception for discussions about investigations by my Office, a local ombudsman, or an appointed closed meeting investigator. The town's procedure by-law should be updated to reflect these exceptions.
- 11 Section 4.8 of the by-law states that minutes shall be recorded, and "shall be approved and/or corrected at the next regular meeting". The by-law does not distinguish between minutes of open and closed meetings.
- 12 Section 5.20 of the by-law states that a member of council can bring a notice of motion in writing to the Clerk at the close of a meeting for debate at the next regularly scheduled council meeting. According to the by-law, the notice of motion is "merely a statement of intention and is required in the case of motions being raised by any Member who wishes to introduce a motion at Council which affects policies or procedures".

Background: Notice of motion

- 13 The Town of Grimsby owns a municipally-controlled corporation, Niagara Power Inc., which acts as a holding company for three subsidiaries: Grimsby Power, Grimsby Hydro (which owns a portion of the Niagara Regional Broadband Network), and Grimsby Energy.¹

¹ A private corporation owns a small portion of the company's shares.

- 14 Town staff told us that decisions about Niagara Power Inc. are usually managed entirely by the company's board and not discussed at council. When council discusses the company, it is normally in its capacity as a shareholder at a "shareholders meeting", and staff are not present.
- 15 The minutes for a council meeting on April 4, 2016 indicate that Alderman Dave Kadwell submitted a notice of motion for consideration at the April 18 council meeting.
- 16 The agenda package for the town's April 18 council meeting included that notice of motion:

Be it resolved that the Council of the Town of Grimsby hire a chartered business evaluator with experience in the energy sector to establish a business valuation of Niagara Power Inc. and its subsidiaries.

- 17 The April 18 meeting agenda indicated that council would go in camera to discuss "Alderman D. Kadwell – Niagara Power Inc.", under the exceptions in sections 239(2)(a), (b), and (e), for security of the property of the municipality, personal matters about an identifiable individual, and litigation or potential litigation.
- 18 According to the April 18 meeting minutes, the only item discussed in camera was: "Committee Appointments to the Grimsby Economic Development Advisory Committee and the Grimsby Heritage Advisory Committee". Council passed a resolution in open session that day to defer consideration of Alderman Kadwell's notice of motion to the May 2 council meeting.

Meeting on May 2, 2016

- 19 The May 2 meeting agenda indicated that council would go in camera to discuss "Alderman D. Kadwell – Niagara Power Inc.", under the exceptions in sections 239(2)(a), (b), and (e), for security of the property of the municipality, personal matters about an identifiable individual, and litigation or potential litigation.
- 20 A regular meeting of Grimsby council took place in the council chambers at Town Hall at 7:00 p.m. on Monday, May 2, 2016. Council resolved to go in

camera to discuss “Alderman D. Kadwell – Niagara Power Inc.” under the exceptions in s. 239(2)(a), (b), and (e) at 8:03 p.m. All members of council except Alderman Joanne Johnston were present for the closed session, as were the Clerk and the Town Manager.

- 21 Once in camera, the Town Manager reminded council to focus its discussion on the issues referenced in the resolution.
- 22 Council discussed Alderman Kadwell’s proposal to obtain a business valuation of Niagara Power Inc. and its subsidiaries. One member of council raised a number of concerns about the timing of obtaining such a valuation. Members also referenced a number of other concerns and discussed the fact that this is a sensitive business matter and may be better discussed at a future meeting of the company’s shareholders.
- 23 Following this discussion, Alderman Kadwell decided to withdraw his notice of motion. Council did not vote on the matter or give direction to staff.
- 24 Council returned to open session at 8:29 p.m. The council meeting ended at 8:31 p.m.

Analysis

- 25 In its resolution to close the May 2 meeting, council cited the exceptions in subsections 239(2)(a), (b), and (e). During interviews, town staff indicated that, although they were not cited, the exceptions in ss. 239(2)(c) and (d) might also have applied to the discussion. We considered the applicability of each of these exceptions.

Applicability of the exception in 239(2)(a) for security of the property of the municipality

- 26 Some members of council told us they believe this exception was cited because the discussion pertained to the valuation of an asset, which is municipal property. Other members suggested that, had the matter been discussed publicly, it could have impacted the value of the company. However, all those interviewed agreed that no security threat was discussed during the closed meeting.

- 27 The Act does not define “security” for the purposes of section 239(2)(a). In 2009, the Information and Privacy Commissioner found that “security of the property of the municipality” should be given its plain meaning, in that it applies to protecting property from physical loss or damage (like vandalism or theft), and the protection of public safety in relation to that property.² In 2011, the IPC clarified that the term can apply to both “corporeal” and “incorporeal” property, as long as it is owned by the municipality and the discussion is about preventing its loss or damage.³
- 28 In this case, there was no apparent threat to the municipality’s property, either corporeal or incorporeal. Instead, council discussed whether to obtain a valuation of a municipally-owned corporation. The discussion did not fit within the exception for security of the property of the municipality.
- 29 While it did not fall within the exception for security of the property of the municipality, the subject of the in camera discussions appears to have been sensitive business or commercial information. There is no exception to the open meeting rules in the *Municipal Act* for discussions about sensitive commercial information. Where municipalities have raised a concern about the inability to discuss sensitive business information in camera, we have referred them to raise their concerns with the Ministry of Municipal Affairs.⁴ The Ministry is currently conducting a review of municipal legislation, including the open meeting rules in the *Municipal Act*.

Applicability of the exception in 239(2)(b) for personal matters about an identifiable individual

- 30 In order to qualify as “personal information” for the purposes of the closed meeting rules, information must reveal something about an individual personally. Information about a person in their professional capacity can be

² Order MO 2468-F (27 October 2009) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2468-F.pdf>>.

³ Order MO-2683-I (30 December 2011) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2683-I.pdf>>.

⁴ See Ombudsman of Ontario, *Investigation into whether Council for the City of Port Colborne held illegal closed meetings* (November 2015) at para 109-110, online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Port-Colborne.aspx>>.

considered personal, but only if something of a personal nature about the individual is revealed.⁵

- 31** No personal information about any identifiable individuals was discussed during the meeting on May 2. Although some generic references were made to staff, and members referenced an ongoing hiring process, no personal information was discussed. One member of council indicated that another member told him a candidate's name at one point, but there is no evidence that this was part of council's discussion, or that any personal information about that individual was discussed. The discussion did not fit within the exception for personal matters.

Applicability of the exception in 239(2)(e) for litigation or potential litigation

- 32** The exception in s. 239(2)(e) for litigation or potential litigation is reserved for circumstances where the subject matter discussed is ongoing litigation or a reasonable prospect of litigation.
- 33** In *RSJ Holdings v. London (City)*, the Ontario Court of Appeal considered the exception in s. 239(2)(e) for litigation or potential litigation. The Court observed that, "The fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the "subject matter under consideration" potential litigation".⁶
- 34** In considering the related law of litigation privilege, the courts have found that, while it is not necessary that litigation have commenced for litigation privilege to apply, "there must be more than a mere suspicion that there will be litigation".⁷
- 35** Amberley Gavel, acting as closed meeting investigator on behalf of Local Authority Services, recently explained that, "Council should not go into closed session merely because another party has the right to bring a

⁵ See Order MO-2204 (22 June 2007) online: IPC <https://www.ipc.on.ca/images/Findings/up-mo_2204.pdf>.

⁶ *RSJ Holdings Inc. v. London (City)*, [2005] OJ No 5037 (QL).

⁷ *R (C) v CAS of Hamilton* (2004), 50 RFL (5th) 394 (Ont SCJ) at para. 21, citing *Carlucci v Laurentian Casualty Co of Canada* (1991), 50 CPC (2d) 62 (Ont Ct (Gen Div)).

lawsuit or other claim against Council or that one speculates that litigation might be brought as a result of a Council decision”.⁸

- 36** No staff or members of council for the Town of Grimsby recalled any discussion of litigation or potential litigation before the courts or a tribunal at the meeting on May 2.
- 37** We were told that an ongoing arbitration process involving the town was referenced briefly. In some cases, binding arbitration may be akin to litigation. The courts have found that litigation privilege attaches to documents prepared in the course of arbitration.⁹
- 38** However, the ongoing arbitration process was not the focus of council’s discussion. Instead, it was mentioned during a discussion focused on whether to obtain a valuation of a holding company. Had this discussion occurred in open session, council could have refrained from mentioning the ongoing arbitration.
- 39** The discussion did not fit within the exception for litigation or potential litigation.

Applicability of the exception in 239(2)(c) for acquisition or disposition of land

- 40** Although not cited by the municipality in its resolution to close the meeting, during interviews, it was suggested that the discussion may have fit within the exception for acquisition or disposition of land. Staff suggested that the discussion fit in this exception because a sale of the hydro company would involve selling land owned by the company.
- 41** The exception for discussions about acquisition or disposition of land is intended to protect a municipality’s bargaining position.¹⁰ It applies when

⁸ Local Authority Services, *A Report to the Corporation of the City of Peterborough* (July 2016) at 10, online: <<http://eagenda.city.peterborough.on.ca/sirepub/cache/2/10pd5dji2qd0kq2ziu3qksr3/8703509132016011834265.PDF>>.

⁹ See *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, [2013] O.J. No. 1443.

¹⁰ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of*

specific land deals are discussed. While there may be land transactions involved in a sale of a municipal company, no land was specifically discussed during the closed meeting on May 2. Further, the discussion was not about selling the company; instead, the discussion focused on whether to obtain a valuation of the company. This discussion did not fit within the exception in 239(2)(c).

Applicability of the exception in 239(2)(d) for labour relations or employee negotiations

- 42** As with the exception for acquisition or disposition of land, the exception in s. 239(2)(d) was not cited by the municipality. It was suggested that this exception may have applied because council mentioned that obtaining a valuation could impact the company's employees and reference was made to the process for appointing a new CEO at the company.
- 43** Labour relations and employee negotiations were not the focus of the discussion, nor was any specific information about employees or labour negotiations discussed. The discussion did not fit within the exception for labour relations or employee negotiations.

Procedural issues: Closed meeting minutes

- 44** Section 239(7) of the *Municipal Act* requires that a municipality record all proceedings of meetings of council, local boards, and committees, whether or not the meeting is closed to the public.
- 45** The Town of Grimsby's procedure by-law requires minutes to be recorded and "approved and/or corrected at the next regular meeting". The by-law does not distinguish between minutes of open and closed meetings.
- 46** The Town's Clerk takes minutes of closed meetings, but those minutes are not brought back to council for review or approval. Instead, they are stored in the Clerk's office. During interviews, a majority of council told us that

Information in Local Government in Ontario, Toronto: Commission on Freedom of Information and Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

they either do not know if anyone takes closed session minutes, or do not believe that anyone takes minutes.

- 47 In accordance with its procedure by-law, and to ensure the accuracy of closed session minutes, the town should ensure that closed session minutes are brought back to council for approval at a subsequent closed meeting.
- 48 We were told that town staff plan to propose the audio recording of closed sessions. We commend staff for taking steps to implement audio recording and recommend council take steps to support that initiative. Audio recording closed meetings inspires community trust in the transparency and accountability of local government. It also ensures a complete and accurate record of closed session discussions and facilitates and expedites the review process, should a complaint be received. Many municipalities are opting to audio or video record closed meetings, including four other municipalities we know of in Niagara Region: the Cities of Welland, Port Colborne, and Niagara Falls, and the Town of Fort Erie.

Opinion

- 49 Council for the Town of Grimsby contravened the *Municipal Act, 2001* and the municipality's procedure by-law when it discussed a matter in camera on May 2, 2016 that did not fall within any of the Act's permitted exceptions.

Recommendations

- 50 I am making the following recommendations to assist the Town of Grimsby in adhering to the open meeting requirements of the Act and to improve its procedures and practices related to meetings of council.

Recommendation 1

All members of council for the Town of Grimsby should be vigilant in adhering to their individual and collective obligation to ensure that the municipality complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Town of Grimsby should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

The Town of Grimsby should implement the practice of audio or video recording its open and closed sessions.

Recommendation 4

The Town of Grimsby should ensure closed session minutes are reviewed by council in accordance with its procedure by-law.

Recommendation 5

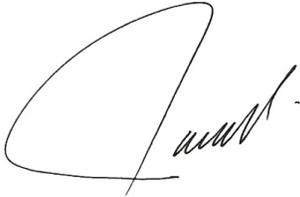
The Town of Grimsby should update its procedure by-law to reflect all the closed meeting exceptions in the *Municipal Act, 2001*.

Report

- 51 Council for the Town of Grimsby was given the opportunity to review a preliminary version of this report and provide comments. We received comments from the town's Mayor, with which council concurred. We also received comments on behalf of the town from the Town Manager. All comments received were considered in the preparation of this final report.
- 52 Through the Mayor and the Town Manager, council submitted that it believes that the town's obligations under the open meeting rules are, in this instance, incompatible with its obligations with respect to confidentiality as a shareholder of Niagara Power Inc.. As noted above, there is currently no exception in the *Municipal Act* for discussions about confidential or sensitive business information. The Ministry of Municipal Affairs is undertaking a review of the Act, and the town may wish to raise this concern with the Ministry.
- 53 The Clerk informed us that the town plans to update its procedure by-law in accordance with our recommendation. Council also plans to begin audio recording closed meetings, which will greatly assist with any future

investigations. Further, the town plans to ensure that closed meeting minutes are provided for review and approval by council at each subsequent closed meeting.

- 54 My report should be shared with council for the Town of Grimsby. The report should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman