



Ombudsman Report

**Investigation into closed meetings by the
United Townships of Head, Clara and Maria
on October 21 and November 4, 2011**

**André Marin
Ombudsman of Ontario
August 2012**

Complaints

- 1 On November 7, 2011, our Office received a complaint that the Council for the United Townships of Head, Clara and Maria had held improper closed sessions on October 21 and November 4, 2011. The complaint to our Office alleged that the discussions that took place *in camera* were not appropriate for a closed session.

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 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 Ontario Ombudsman is the investigator for the United Townships of Head, Clara and Maria.
- 5 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.

Council meeting procedures

- 6 The procedure by-law (by-law 2012-14) states that regular meetings of the Council for the United Townships of Head, Clara and Maria are held on the first and third Friday of each month at 2 p.m. unless council directs otherwise by resolution.
- 7 The procedure by-law provides that items cannot be added to the agenda without the unanimous agreement of council. It states that all meetings are open to

the public, “except for those specifically allowed by the *Municipal Act*, R.S.O. 2001, as amended or any other act.”

Investigative process

- 8** After conducting a preliminary review of the complaints, our Office notified the town on March 12, 2012 that we would be conducting an investigation.
- 9** During the course of our investigation, we obtained and reviewed relevant municipal documents, including minutes, agendas, emails and other municipal records. We also considered the town’s procedure by-law and applicable legislation and case law.
- 10** In accordance with s. 19(1) of the *Ombudsman Act*, members of council and town staff are required to provide our Office with any documents or information requested during the course of our investigations. Council members and town staff co-operated fully with our investigation.
- 11** A two-person team conducted interviews with all members of council and the Clerk, as well as the former Deputy Clerk/Treasurer.

Investigative findings

- 12** Provided the procedural requirements have been met, council is entitled under the Act and its own procedure by-law to hold closed meetings to discuss personal matters about an identifiable individual, including municipal employees (s. 239(2)(b) of the Act).
- 13** In accordance with our normal process the Township was given an opportunity to review a preliminary draft of my report, and to make any relevant representations before the report was finalized. Council and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.
- 14** Four councillors and the Clerk were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. We received one set of comments on the preliminary report, which were reviewed and considered prior to this report being finalized.

- 15** As a result of our investigation, we determined that the discussions that took place *in camera* on October 21 and November 14, 2011, were permissible under exceptions to the open meeting requirements.

The October 21 meeting

- 16** The agenda for the October 21 meeting indicated that council would be holding a closed session to discuss “harassment complaints.” Council was to discuss a staff report entitled “Harassment Options Report.” It outlined draft resolutions for council to pass in order to manage recent harassment allegations made by the municipal clerk. The report also provided background information on the definition of “harassment” and council’s duty as an employer in dealing with such allegations.
- 17** Council passed a resolution in open session to proceed *in camera* under s. 239(2)(b) of the Act (“personal matters about an identifiable individual”) and s. 239(2)(e) (“litigation or potential litigation”) to discuss “harassment complaints that have been filed by the Clerk and a code of conduct complaint” against a councillor, filed by a named member of the public. The code of conduct complaint related to the councillor’s involvement in a private dispute between the Clerk and the member of the public.
- 18** The code of conduct complaint was not on the original agenda for the closed meeting. During interviews, a member of council described being approached by this member of the public prior to the October 21 meeting with a request that the Code of Conduct complaint against the clerk be brought to council that evening. The person did not want to go through the standard process – which involved filing the complaint with the Clerk directly – because it was felt the Clerk would be in a conflict of interest. This was due to the individual’s personal dispute with the clerk, which was detailed in the Code of Conduct complaint. The council member did bring the complaint forward at that evening’s meeting and asked that the item be added to the *in camera* discussion.
- 19** During interviews, we received contradictory information regarding whether this item was added to the agenda in accordance with the procedure by-law, which requires a unanimous vote of council in order to amend the agenda at a meeting. One member of council believed that a resolution was passed to add the item to the agenda, while another member was sure such a resolution was not passed. One interviewee believed that by voting on the resolution to proceed into closed session (which was passed unanimously), council had fulfilled the requirements of the procedure by-law. Others could not recall how the item was

added to the agenda. The minutes do not record a vote being taken specifically to amend the agenda to add the code of conduct complaint to the closed session agenda.

- 20** According to the minutes, the *in camera* discussion about the code of conduct complaint specifically involved the fact that it was not filed in accordance with the municipality's rules, because it was not filed with the Clerk. Information provided to our Office during interviews indicated that Council also discussed the underlying conflict between the Clerk and the member of the public who filed the complaint, as background information to explain why the member of the public filed the complaint with a member of council rather than with the Clerk. One member of council described this matter to us as a "private dispute" and did not feel that it concerned council at all. Another member of council felt that there could be legal repercussions to the municipality as a result of the complaint, and that it was therefore appropriate for discussion in closed session under the "litigation or potential litigation" exception. A member of staff advised us this matter was not appropriate for closed session discussion, as the details of the conflict giving rise to the complaint were already known to most people in the municipality.
- 21** At the end of this discussion, the Clerk was directed to send a letter to the member of the public who filed the code of conduct complaint, indicating that the complaint was filed improperly, and providing information about how it should be done.
- 22** According to the minutes, the councillors next discussed the Clerk's harassment complaints, stemming in part from an altercation between the Clerk and a member of the public during a council meeting. Council discussed what actions to take in response to these complaints. During interviews, we were advised that part of the discussion involved whether to take legal action on the harassment complaints.
- 23** One councillor told us the discussions that took place *in camera* on October 21 were appropriate for a closed session because they dealt with "allegations of harassment that were not yet proved." It was this councillor's opinion that it would be inappropriate to "name names" when the truth of the allegations was uncertain.
- 24** Another councillor felt this discussion belonged in closed session because council was considering taking legal action against a member of the public involved in the alleged harassment. This councillor also believed that the matter involved personal matters – specifically, a personal dispute between the Clerk and a resident.

- 25** There is no indication that council reported back to the public regarding what occurred during the closed session, other than to pass motions arising from the *in camera* discussion. All those we interviewed told us council does not report back in open session regarding what occurred during closed session. Their general practice is that the only information provided to the public about *in camera* sessions is the passing of resolutions resulting from the discussions in closed session.
- 26** When the open session resumed, council passed a number of resolutions involving response to the Clerk's harassment allegations. One resolution, authorizing the municipal solicitor to commence legal proceedings against a member of the public on behalf of the Clerk, was defeated.

The November 4 meeting

- 27** The agenda for the November 4 meeting did not indicate that there would be a closed session. The former Deputy Clerk/Treasurer told us that this was because staff thought all items would be discussed in open session. The minutes note that part of the Treasurer's report to be discussed at the meeting pertained to a motion that was passed at the previous council meeting, regarding the Clerk's harassment complaints. According to the minutes, council decided to discuss this issue in closed session against the advice of the Deputy Clerk/Treasurer. At the meeting, the Deputy Clerk/Treasurer advised council that the exceptions for public meetings are discretionary and "there was no obligation to discuss these resolutions in closed session."
- 28** The former Deputy Clerk/Treasurer told us during her interview that the town's population is very small and "everyone" was aware of the harassment complaints. In her view, council would not be discussing anything *in camera* that was not already public knowledge.
- 29** Council passed a resolution to enter closed session to discuss personal matters about an identifiable individual. While *in camera*, council discussed hiring an independent investigator to review the Clerk's harassment complaints.
- 30** When open session resumed, a motion was passed to "investigate the cost of having (the Clerk's) complaints referred to an experienced independent investigator/mediator to be chosen by council for proper consideration."

Analysis

- 31** The information provided to our Office indicates that at both the October 21 and November 4 meetings, council proceeded *in camera* to discuss “personal matters about an identifiable individual.” The discussions involved harassment complaints made by the Clerk against an identified member of the public, and a code of conduct complaint made by a member of the public against a councillor. Generally, information pertaining to complaints against councillors in their professional capacity will not be suitable for *in camera* discussion. However, in this case, we were advised that the discussions involved personal information about private conflicts involving members of the public.
- 32** Some of the information discussed during the closed session was already available to the public, partially because identifying information was included in the open-session materials, and partially due to word of mouth. However, we were also told that some individuals whose personal information was being discussed were upset by the amount of identifying information included in the open session minutes, and felt this was a violation of their privacy. The purpose of this exception is to protect an identifiable individual’s right to privacy. As noted by the Ontario Superior Court of Justice in *Ontario (Ministry of Correctional Services) v. Goodis*,¹ “If there is reasonable expectation that the individual can be identified from the information, then such information qualifies...as personal information.” Although all exceptions to the open meeting requirements should be interpreted narrowly and applied prudently, in this case the closed session discussions fit within the parameters of the “personal matters” exception.
- 33** With respect to the second exception cited at the October 21 meeting – litigation or potential litigation – we were provided with contradictory information regarding why this exception was included in the resolution to proceed into closed session. Some councillors believed the exception pertained to the first part of the *in camera* discussions (the code of conduct complaint), some councillors believed it applied to the second (the Clerk’s harassment complaints), and others were unsure whether it applied to either or both.
- 34** At the October 21 meeting, when discussing the Clerk’s harassment complaints, council considered whether to initiate legal proceedings related to these complaints. This would fit within the “litigation or potential litigation” exception. We were also advised that there was some discussion as to the

¹ [2008] O.J. No. 289

possibility that legal action could be taken against the municipality as a result of the code of conduct complaint, which was the first item discussed while *in camera*. Some members of council told us that this was the reason “litigation or potential litigation” was cited in the resolution to proceed in closed session.

- 35** With respect to the code of conduct complaint, there was no actual evidence of any current or future legal proceedings related to this issue. Mere speculation that litigation may arise in the future is not sufficient to bring a discussion within the scope of s. 239(2)(e). As noted, however, the code of conduct complaint could fit within the scope of the “personal matters about an identifiable individual” exception.
- 36** For further clarity, council should consider passing a resolution that itemizes which exception applies to which item of discussion. This would assist in ensuring there is no confusion about why a particular item is being discussed *in camera* as opposed to in open session.
- 37** During our investigation, we also observed some problematic practices. First, council added an item – the code of conduct complaint - to the agenda at the last minute during the October 21 meeting. It is not clear that council followed its own procedure by-law, which requires a unanimous vote to amend the agenda, prior to doing so.
- 38** Consistent with the principles of openness, transparency and accountability that underlie the open meeting requirements, council generally should avoid discussing items that have not been the subject of prior notice. Matters should not be added at the last minute unless they are clearly urgent, or there are significantly compelling reasons to justify suspending the normal notice procedures. Furthermore, items should not be added to an agenda unless the requirements of the procedure by-law have been followed.
- 39** Second, it does not appear that council reports back publicly in an informed way about closed meetings. We encourage municipalities to report publicly in open session on what transpired in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session and information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided to the public.

Opinion

- 40** Our investigation found that the discussions that took place during the October 21 and November 4 closed council meetings did fit within the “personal matters about an identifiable individual” exception, and one subject of discussion that took place in camera at the October 21 meeting did fit within the “litigation or potential litigation” exception to the open meeting requirements.
- 41** Council is encouraged, however, to accept the best practice recommendations outlined in this report in order to improve transparency and the level of information available to the public about items to be considered in closed meetings.

Report

- 42** My report should be shared with Council for the United Townships of Head, Clara and Maria and made available to the public as soon as possible, and no later than the next Council meeting.



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