



Ombudsman Report

**Investigation into the
Township of West Lincoln's
alleged violation of the *Municipal Act, 2001*
on June 15 and June 22, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaint

- 1** In June and July 2015, our Office received three complaints about closed meetings held in the Township of West Lincoln on June 15 and June 22, 2015. Each of the three complaints raised the same issues and will be addressed jointly in this report.
- 2** The complaints alleged that the agenda for the June 15, 2015 meeting of the Administration/Finance/Fire Committee did not provide notice that the committee would discuss a proposed site alteration by-law in closed session. Each complaint also alleged that council for the Township of West Lincoln illegally voted to approve the site alteration by-law during council's closed session on June 22, 2015.

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 Township of West Lincoln.
- 6** 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.

Investigative process

- 7** On July 16, 2015, we advised council for the Township of West Lincoln of our intent to investigate this complaint.
- 8** Members of our Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township's procedure by-law and the Act, as well as

relevant meeting agendas, minutes, and materials. They spoke with the township's Clerk and Mayor, as well as Councillor Terry Bell. Our Office spoke with Councillor Bell because he introduced the site alteration by-law matter at the committee meeting on June 15.

- 9** We received full co-operation in this matter.

Council procedure

- 10** Section 2.6 of the township's procedure by-law¹ requires that, prior to going in camera, council pass a resolution closing the meeting to the public and indicating the general nature of the matter to be considered.
- 11** Section 2.8 of the by-law requires that meetings be open to the public, subject to certain exceptions. The by-law generally reproduces the exceptions found in section 239 of the Act. However, it incorrectly states that the closed meeting exception for requests under the *Municipal Freedom of Information and Protection of Privacy Act* is a permissive, rather than a mandatory, exception to the open meeting requirements.
- 12** Section 3.1(d) of the by-law requires that public notice be provided at least twenty-four hours before each regular or special council and committee meeting. Notice is to be posted on the township's website and on the paper meeting calendar on the doors of the township administration building.
- 13** Section 4.13 of the by-law provides that at regular meetings, new items of business may be added to the agenda if they require immediate attention and direction from the council or committee. A new item of business must be introduced by a motion and passed by a majority vote of the members present. New items that are purely of an informational nature may be brought forward by any member, without a motion, under the "Other Business" section of the agenda.
- 14** Section 9 of the by-law specifies the procedure for passing new by-laws. Each by-law must receive three readings to be passed. The procedure by-law indicates that specific wording must be used for each motion for a first, second, and third reading. Section 9.7 confirms that the three readings required to pass a new by-law may occur at the same council meeting.

¹ Township of West Lincoln, by-law No 2013-58, *Being a by-law to adopt rules for procedures of council and committees thereof* (27 May 2013).

Background: Site alteration by-law (by-law 2015-55)

- 15** The practice of importing materials such as soil, stone, concrete, asphalt, sod or turf, collectively known as “fill”, into the township has been an ongoing concern for some residents dating back to at least 2007.
- 16** In response, on June 22, 2015 council passed by-law 2015-55, *Township of West Lincoln Site Alteration By-law*.² The by-law is broadly worded and prohibits nearly all “placing or dumping of fill within the Township”. Dumping is defined as the “depositing of fill in a location other than where it was obtained” and includes moving fill from one location on a property to a different location. The by-law includes some exceptions for work authorized under other legislation, but is otherwise quite comprehensive. The by-law gives the township strong inspection powers and establishes extensive fines for non-compliance.

June 15, 2015 committee meeting

- 17** On June 15, 2015, the Administration/Finance/Fire Committee held a meeting at the township administration building at 6:30 p.m. The committee consists of the Mayor and each member of council.
- 18** Notice of the meeting was posted in accordance with the township’s procedure by-law.

The agenda

- 19** We received a complaint that the June 15 agenda did not contain information that the committee would discuss the proposed site alteration by-law in closed session.
- 20** The meeting agenda was posted on the township’s website at least twenty-four hours before the meeting. The agenda listed two items to be discussed in closed session and identified two closed meeting exceptions. Neither of these matters related to the site alteration by-law. Rather, the by-law matter was added to the agenda during the committee meeting and discussed in a separate closed session from the two matters identified on the agenda.

² Township of West Lincoln, by-law No 2015-55, *Township of West Lincoln Site Alteration By-law* (22 June 2015), online: <<http://westlincoln.ca/wp-content/uploads/Site-Alteration-By-law-2015-551.pdf>>.

The meeting

- 21** The open meeting minutes indicate that Councillor Bell requested that the item for “New Business” be moved forward on the agenda to enable him to introduce a new matter relating to a “Confidential Legal Matter – By-law Enforcement – Site Alteration By-law issue”. In accordance with the procedure by-law, Councillor Bell’s motion to add the new item of business was passed by a majority vote.
- 22** At 9:15 p.m., council resolved to go in camera to discuss the proposed site alteration by-law, citing the following closed meeting exceptions:
- personal matters about an identifiable individual, including municipal or local board employees;
 - litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and
 - advice that is subject to solicitor-client privilege, including communications necessary for that purpose.
- 23** The resolution to go into closed session did not provide any additional information about the matter that the committee would discuss in camera.
- 24** During the closed session, the committee discussed how trucks with fill were being “imported” into the township to specific locations. During interviews, Councillor Bell and the Clerk indicated that the committee identified properties where the fill was being dumped. However, specific individuals were not identified by name.
- 25** During the discussion, the committee focused on the potential legal ramifications of imposing a new site alteration by-law. Although the township solicitor was not present and no new legal opinion was considered at this meeting, everyone interviewed agreed that the committee incorporated previous legal advice into its analysis of the situation. The committee members had received numerous legal opinions at prior closed meetings regarding the municipality’s right to enforce a site-alteration by-law, as well as various drafting options.
- 26** Before returning to open session, the committee directed staff to investigate the issue further and prepare a by-law for council’s approval. When open session resumed, the committee passed one resolution – “that, staff be and are hereby authorized to proceed as directed in closed session regarding a Legal Matter – By-law Enforcement – Site Alteration By-law issue”.
- 27** The meeting adjourned at 9:43 p.m.

Analysis

Closed session exceptions

- 28** The committee cited three exceptions when it moved into closed session to discuss the proposed site alteration by-law.

Advice subject to solicitor-client privilege

- 29** Subsection 239(2)(f) of the *Municipal Act* permits a municipality to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose, in closed session.
- 30** This exception can only be used when advice from a solicitor or related communication actually exists for council's consideration. Communication will only be found to be subject to solicitor-client privilege if it is: (a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity; (b) made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential.³
- 31** On June 15, the committee was specifically discussing various communications from the municipality's solicitor that provided advice about the municipality's legal options for regulating the dumping of fill and enforcing certain penalties. The committee chose to discuss this advice in closed session to retain its confidentiality. While the committee was not given a new legal opinion at the June 15 meeting, the committee discussed the advice that the township's solicitor had previously provided. Accordingly, the discussion fell within the exception in section 239(2)(f).

Other exceptions cited

- 32** While the committee's discussion properly fell within the closed meeting exception for advice subject to solicitor-client privilege, our Office also considered whether the in camera discussion fell within the other exceptions cited by the committee. These included the "personal matters about an identifiable individual" exception in section 239(2)(b) and the "litigation or potential litigation" exception in section 239(2)(e).

³ *Solosky v the Queen*, [1980] 1 SCR 821 at 837.

- 33** The *Municipal Act* does not define “personal matters” for the purposes of section 239. The Information and Privacy Commissioner (IPC) has found that the related term “personal information” is limited to information where it is reasonable to expect that the individual could be identified if the information was disclosed.⁴ The Ontario Superior Court of Justice confirmed this interpretation, noting that, “[i]f there is a reasonable expectation that the individual can be identified from the information, then such information qualifies...as personal information”.⁵
- 34** In a letter to the Township of the North Shore in 2011, our Office determined that general information about properties, including how many water valves were associated with the property, would not amount to “personal matters” about the property owner.⁶ Similarly, the IPC has determined that the municipal locations of certain properties and their estimated market values do not constitute “personal information” about the individual property owners.⁷
- 35** None of those interviewed remembered discussing individuals by name, although the Clerk and Councillor Bell believe that individual properties were identified. However, even if individual properties were identified, no personal information was revealed about the property owners. Therefore, the committee’s discussion did not fit within the exception in section 239(2)(b).
- 36** Council also cited the exception for “litigation or potential litigation” for the purposes contained in section 239(2)(e). In order for the “litigation or potential litigation” exception to apply, litigation must be more than a remote possibility, although it does not need to be a certainty. Council or a committee must believe that litigation is a reasonable prospect, and must use the closed meeting to explore that prospect in some way.⁸
- 37** Each person interviewed agreed that there was no current or pending legal proceedings related to the subject of the proposed by-law as of the June 15 committee meeting. Accordingly, the discussion did not fall within the exception in section 239(2)(e).

⁴ Order PO-1880 (15 March 2001), online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/PO-1880.pdf>, upheld on appeal in *Ontario v Pascoe*, [2002] OJ No 4300 at para 2.

⁵ *Ontario (Ministry of Correctional Services) v Goodis*, [2008] OJ No 289 at para 69.

⁶ Letter from Ombudsman of Ontario to Township of the North Shore (4 June 2012).

⁷ Order R-980015 (17 December 1998), online: IPC <https://www.ipc.on.ca/images/Findings/up-r_980015.pdf>.

⁸ *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)).

38 While the committee’s discussion was legally closed to the public under section 239(2)(f) of the *Municipal Act*, the Township of West Lincoln should take care to only cite the exceptions in the Act that apply to the in camera discussion.

Procedural matters

Resolution to proceed in camera

39 The committee’s resolution to proceed in camera only referenced the three exceptions relied on by the committee to close the meeting to the public. It did not provide further information about the subject of the committee’s discussion.

40 Both the Act (section 239(4)) and the township’s procedure by-law require that the resolution to proceed in camera include the general nature of the subject matter to be considered. As noted by the Court of Appeal in *Farber v. Kingston City*,⁹ “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”.

41 In a 2014 report regarding closed meetings in the Municipality of Kincardine, Local Authority Services (LAS) interpreted this as requiring that “the wording of the resolution...do more than simply refer to the section of the *Municipal Act* that permits the closed meeting exception”.¹⁰ Rather, there is a requirement that municipalities add a “level of informative detail” to the resolution.

42 Our Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office’s 2015 review of closed meetings in the Municipality of South Huron, we noted that council’s resolution “should provide a brief description of the subject matter to be considered in closed session”.¹¹

43 In this case, the resolution to enter closed session only referenced the exception relied on by the committee to close the meeting to the public. Councillor Bell’s

⁹ 2007 ONCA 173 at para 21.

¹⁰ Local Authority Services, *Report to the corporation of the Municipality of Kincardine* (July 2014) at 8, online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>>.

¹¹ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: <https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf>.

resolution to add the site alteration by-law matter to the agenda had previously disclosed the proposed subject of the in camera discussion. This indicates that the committee could have provided more information about the subject to be discussed in camera without undermining the reason for excluding the public. For instance, the committee could have included the same information from Councillor Bell's motion ("Confidential Legal Matter – By-law Enforcement – Site Alteration By-law issue") in the resolution to proceed in camera.

- 44** The township should ensure that resolutions to enter closed session contain a general description of the issue to be discussed and do not merely cite a list of closed meeting exceptions.

Notice of the site alteration by-law discussion

- 45** We received a complaint that the June 15 agenda did not contain notice that the committee would discuss the proposed site alteration by-law in closed session.
- 46** The Act does not specify the content of the meeting notice that must be given to the public. However, section 238(2.1) of the Act requires that a municipality provide for public notice of its meetings in its procedure by-law. There is no provision in the Act that requires a municipality to provide advance notice of the individual matters that will be discussed in closed session.
- 47** West Lincoln's procedure by-law requires the township to post notice of committee meetings on the township's website and on the paper meeting calendar in the township administration building at least twenty-four hours before the meeting. Our investigation found that these requirements were met. Therefore, the meeting notice provisions of both the Act and the township's procedure by-law were technically satisfied for the June 15 committee meeting.

Amending the committee's agenda

- 48** Section 4.13 of West Lincoln's procedure by-law states that new items may only be added to a meeting agenda when they require "immediate attention and direction" from council. To introduce a new item of business that requires "immediate attention and direction", a council or committee member must put forward a resolution to add the item. This resolution must be approved by a majority vote of the members present.
- 49** The term "immediate" is not defined in the township's by-law or the *Municipal Act*. However, our Office has previously determined that the related term

“emergency” expresses the same concept and is defined as an unexpected circumstance “requiring immediate or urgent action”.¹²

50 Our Office has previously recommended that new matters should not be added to the meeting agenda unless “urgency” or “emergency” so requires. In reviewing closed meetings in the Town of Mattawa in 2010, our Office recommended that:

[Agenda items] that have not been the subject of advance notice should only be considered in rare circumstances where urgency doesn’t permit the normal notice requirements to be observed.¹³

51 Similarly, in a 2014 report regarding closed meetings in the Municipality of Kincardine, LAS recommended that items be added to an agenda “only in circumstances needing immediate attention where advance notice is impossible”.¹⁴ In that case, Kincardine council discussed the proposed sale of a municipal asset at various meetings without providing advance notice to the public on the meeting agenda.

52 Our investigation found no indication that the site alteration matter needed council’s immediate or urgent action, such that advance notice could not have been provided by following the normal process of adding the item to the public meeting agenda. While those interviewed did indicate that the practice had escalated in the spring of 2015, the practice of importing fill into the township has been an ongoing concern, dating back to at least 2007. When we asked Councillor Bell why he chose to introduce the site alteration by-law as a new item at the June 15 committee meeting, he said that he did not have a reason for choosing that particular meeting. Rather, he was finally “ready to move forward” with the matter. He indicated that he had done his “due diligence” and felt it was time for the township to seriously address the issue.

53 Since the site alteration by-law matter did not require immediate attention and direction, the Administration/Finance/Fire Committee violated the township’s procedure by-law when it added the site alteration by-law matter to the meeting

¹² Ombudsman of Ontario, *Investigation into whether Council for the Municipality of Magnetawan held illegal closed meetings* (June 2015) at para 31, online:

<https://www.ombudsman.on.ca/Files/sitemedia/files/FinalReport-Magnetawan_2015.pdf>.

¹³ Ombudsman of Ontario, *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings* (December 2010) at para 49, online:

<<https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>>.

¹⁴ Local Authority Services, *Report to the corporation of the Municipality of Kincardine* (July 2014) at 8, online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>>.

agenda on June 15, 2015. If the committee did not feel that the matter could wait until the next regular committee meeting, it was open to the committee to schedule a special committee meeting and provide notice in accordance with the township's procedure by-law.

June 22, 2015 council meeting

- 54** On June 22, 2015, council held a regular council meeting at the township administration building at 7:00 p.m. Notice of the council meeting was posted on the township's website on June 19, 2015. In addition, notice was posted on the paper meeting calendar in the township administration building at the beginning of June.
- 55** The agenda listed three matters that would be discussed in closed session. The by-law matter was listed as "Re: Legal Matter – By-law Enforcement – Site Alteration By-law". During the course of the meeting, council added an unrelated fourth matter to be discussed in closed session.
- 56** Council resolved at 8:15 p.m. to go in camera to discuss four matters, relying on the closed meeting exceptions for:
- the security of the property of the municipality or local board;
 - personal matters about an identifiable individual, including municipal or local board employees;
 - litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and
 - advice that is subject to solicitor-client privilege, including communications necessary for that purpose.
- 57** The resolution to proceed in camera only cited these closed meeting exceptions; it did not provide additional information about the in camera discussion items. In addition, the resolution did not specify which closed meeting exception(s) was intended to apply to the site alteration by-law discussion.
- 58** During the closed session, the Director of Planning & Building distributed various materials related to the site alteration by-law discussion that had been provided by the township solicitor. A legal opinion from the township solicitor, dated June 18, 2015, was also distributed. The Director reviewed the legal opinion and other materials with council. Our interviews indicate that council deliberated on the contents of the new legal opinion, previous legal opinions, and other materials provided by the township solicitor.

- 59** Open session resumed at 10:23 p.m. Councillor Bell moved that a by-law be presented “to prohibit the dumping of fill and the alteration of the grade of land within the Township of West Lincoln”. The motion carried. Councillor Joann Chechalk then moved to introduce *The Township of West Lincoln Site Alteration By-Law*. The motion carried. Councillor Chechalk further moved that the by-law be read a first, second and third time. Ultimately, council approved the by-law.
- 60** The meeting adjourned at 10:40 p.m.

Analysis

Closed session exceptions

- 61** Our Office was unable to specifically determine which closed meeting exception(s) council intended to rely on to discuss the site alteration by-law matter. Each person interviewed had a different understanding of which closed meeting exceptions related to which confidential matters. As indicated previously, council relied on four closed meeting exceptions to discuss four different in camera matters. While the *Municipal Act* does not require council to specifically indicate which exception they intend to rely on for each matter discussed in camera, the township should adopt this as a best practice.
- 62** The closed meeting exception that most clearly applied to the site alteration by-law discussion was section 239(2)(f) for advice that is subject to solicitor-client privilege. The township solicitor prepared various materials, as well as a legal opinion, for council’s consideration and discussion. Each person we interviewed agreed that council discussed the solicitor’s recent legal opinion, as well as previous legal opinions that had been provided to the council. Council’s discussion, therefore, falls within the exception for advice subject to solicitor-client privilege.
- 63** Given my finding that the discussion of the site alteration by-law fell within the solicitor-client privilege exception, it is not necessary to consider whether it also could have fallen within other closed meeting exceptions cited for the closed session discussion of four different matters. However, as recommended previously, council for the Township of West Lincoln should take care to cite only the exceptions in the Act that apply to each matter discussed in closed session.

Procedural matters

Resolution to proceed in camera

- 64** As analyzed previously, both the Act (section 239(4)) and the township's procedure by-law require that the resolution to proceed in camera include the general nature of the subject matter to be considered.
- 65** In this case, council's resolution to proceed in camera failed to provide meaningful information to the public about the issues that council would discuss in camera. In contrast, the meeting agenda provided a general description for three of the four matters that council intended to discuss in camera, and the fourth matter was disclosed in open session when it was added to the closed meeting agenda. The meeting agenda described the site alteration by-law matter as "Re: Legal Matter – By-law Enforcement – Site Alteration By-law". Council could have included this same information in council's resolution to enter closed session without undermining the reason for excluding the public.

By-law voted on in closed session

- 66** We received a complaint alleging that council illegally voted to approve the site alteration by-law during the closed session on June 22, 2015, contrary to section 239(5) of the *Municipal Act*.
- 67** Our investigation determined that the alleged vote did not occur in closed session. The open meeting minutes from June 22 indicate that the vote referenced in the complaint occurred in open session following council's closed session discussion. Each person interviewed confirmed that council passed the site alteration by-law after council returned to open session. As indicated previously, the first, second and third reading of the by-law did occur at the same council meeting; however, the township's procedure by-law permits this practice.
- 68** Accordingly, council did not violate the *Municipal Act* or its procedure by-law when it voted in open session to approve the site alteration by-law on June 22, 2015.

Opinion

- 69** The closed session discussions by the Administration/Finance/Fire Committee and council for the Township of West Lincoln of the site alteration by-law on June 15 and June 22, 2015 fell within the solicitor-client privilege exception in

section 239(2)(f) of the *Municipal Act, 2001*. These discussions did not violate the Act's open meeting rules.

- 70** However, the township did not comply with section 239(4)(a) of the Act when it failed to state by resolution the general nature of the matters to be considered in camera on June 15 and June 22, 2015.
- 71** I also find that the Administration/Finance/Fire committee contravened the township's procedure by-law on June 15 when it added the site alteration by-law as a new matter to the meeting agenda. This matter did not require immediate attention and direction from the committee such that the normal public notice and agenda procedures could not have been followed.
- 72** The township is also not following the best practices of indicating which closed meeting exception(s) applies to each subject proposed for closed meeting discussion and citing only those exceptions applicable to each matter.

Recommendations

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

Recommendation 1

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

Recommendation 2

When proceeding in camera, the Township of West Lincoln should pass a resolution that includes both the fact of holding the closed meeting and the general nature of the subject matter to be discussed.

Recommendation 3

In accordance with its procedure by-law, the Township of West Lincoln should only add new matters to a meeting agenda when immediate attention and direction is required from the committee or from council such that the normal public notice and agenda procedures cannot be followed.

Recommendation 4

As a best practice, the Township of West Lincoln should clearly specify which closed meeting exception it intends to rely on for each individual matter discussed in camera.

Recommendation 5

The Township of West Lincoln should take care to cite only the closed meeting exceptions in the Act that apply each matter to be considered in the in camera discussion.

Report

74 OMLET staff spoke with the Clerk, Mayor, and Councillor Bell on November 9, 2015 to provide an overview of these findings and to give the township an opportunity to comment. All comments were taken into account in preparing this report.

75 This report should be shared with council for the Township of West Lincoln and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario