



Ombudsman Report

**Investigation into whether
Council for the Village of Westport
held an illegal closed meeting on
October 28, 2014**

**André Marin
Ombudsman of Ontario
January 2015**

Complaint

- 1** On October 30, 2014, my Office received a complaint about a closed session held by council for the Village of Westport on October 28, 2014.
- 2** According to the complaint, notice of the meeting was not provided in accordance with the village's procedure by-law.

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 Village of Westport.
- 6** In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

The 2014 municipal election

- 7** Municipal elections were held across Ontario on October 27, 2014. The meeting in question took place the next day, October 28 – however, the newly elected council did not take office until December 2014. In this report, all mentions of the Mayor and council refer to the council as it stood on the day of the meeting.

Investigative process

- 8** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law (by-law 95-7) and the Act, as well as the meeting materials for the October 28, 2014 meeting. They also spoke with municipal staff.

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

Council procedures

- 10** The village's procedure by-law states that regular meetings of council will be held on the second and fourth Monday of each month at 7 p.m. in council chambers.
- 11** According to the by-law, the clerk shall summon a special meeting upon receipt of a petition of the majority of council members. The special meeting may not be held sooner than 48 hours following receipt of the petition, and the clerk shall provide written notice of the special meeting immediately following receipt of the petition. In the case of a bona fide emergency, the meeting may be held as soon as possible.
- 12** Section 4 of the by-law states that all council meetings shall be open to the public, subject to the exceptions in the Act.

The October 28, 2014 meeting

- 13** The October 28 meeting was a special closed council meeting. Municipal staff advised my Office that the meeting date was confirmed with members of council on October 20, but due to various circumstances, notice of the meeting was not posted publicly in the municipal office until the morning of October 28.
- 14** The agenda for the meeting indicated that council would be proceeding in camera under s. 239(2)(e) of the Act to address "a legal matter." Council would be receiving a presentation by legal counsel. The clerk told us this agenda was not made available to the public.
- 15** The clerk told us it is not the municipality's practice to keep public minutes for closed sessions, and there were no public minutes kept for the October 28 closed meeting. The closed session minutes note that council proceeded in camera at 6:58 p.m. to discuss a legal matter under s. 239(2)(e).
- 16** While in camera, the municipality's legal counsel made a presentation to council concerning a potential litigation matter. During the closed session, legal counsel discussed the history and the current status of the matter and made recommendations to council on how to proceed.
- 17** Council moved out of closed session at 8:33 p.m. and did not report back publicly on the in-camera discussion.

Analysis

Notice

- 18** The *Municipal Act* does not specify how notice of meetings must be provided to the public. However, it does state that every municipality must pass a procedure by-law that provides for public notice of meetings (s. 238 (2.1)).
- 19** The village's procedure by-law states that a special meeting cannot be held sooner than 48 hours after receiving a petition to hold the meeting, and the clerk must provide written notice of the special meeting immediately following receipt of the petition.
- 20** The information provided to our Office indicates that the date of the October 28 meeting was finalized on October 20, but notice was not provided to the public until the following week, on the morning of the meeting. Accordingly, the village failed to provide adequate notice of this meeting, in violation of its procedure by-law.
- 21** Although it is not a requirement of the Act, for the sake of clarity the municipality should include in its procedure by-law how notice of meetings is provided to the public (for example, by posting agendas in the village office, or on its website.)

The closed session discussions

- 22** The meeting was closed under s. 239(2)(e), "litigation or potential litigation". The in-camera discussion involved legal counsel providing information about a potential litigation matter and giving advice on next steps. Although litigation had not begun at the time, there was sufficient reason for the municipality to anticipate that it was a realistic possibility. As noted in *R.(C.) v. CAS of Hamilton*:¹

It is not necessary that litigation have been commenced, nor is it 'necessary that it be created at a time when there is a certainty of litigation but merely that litigation is a reasonable prospect. On the other hand, there must be more than a mere suspicion that there will be litigation.'

¹ *R.(C.) v. CAS of Hamilton* (2004), 50 RFL (5th) 394 (Ont. S.C.J.) at para. 21, citing *Carlucci v. Laurentian Casualty Co. of Canada* (1991), 50 CPC (2d) 62 (Ont. Ct. (Gen Div.))

- 23** Accordingly, the October 28 closed session discussion fit within the cited exception. The “advice subject to solicitor-client privilege” (s. 239(2)(f)) exception could also have applied to this discussion. As I noted in my 2009 report regarding the Township of Emo: “The exception concerning privileged advice (applies) when some advice from a solicitor or related communication actually exists for council’s consideration.”²

Procedural matters

Resolution to proceed in camera

- 24** Section 239(4) of the Act requires that, prior to proceeding into closed session, council must state by resolution the fact of holding the meeting, and the general nature of the subject matter to be considered.
- 25** As noted by the Ontario Court of Appeal in *Farber v. Kingston City*³, “the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.”
- 26** On October 28, 2014, council proceeded in camera to discuss “a legal matter” under section 239(2)(e) of the Act. No further information was provided. In order to fulfill its obligations under the Act, council should provide a description of the subject matter to be discussed in closed session. This should be done in a way that maximizes the information available to the public about what is being discussed, while not undermining the reason for proceeding into closed session..

Meeting record

- 27** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at both open and closed meetings. My Office was advised that it is not the municipality’s practice to keep any public minutes of closed session meetings.
- 28** Although all substantive discussions took place during the closed portion of the October 28 meeting, council was still obligated to hold an open session, however brief, during which the resolution to proceed in camera was passed. Council should follow a practice of keeping public minutes that capture this portion of the meeting.

² Ombudsman of Ontario, *Municipal Government by Stealth* (January 30, 2009), online: <https://ombudsman.on.ca/Files/sitemedial/Documents/Resources/Reports/Municipal/emofinaleng.pdf>

³ [2007] O.J. No. 919, at page 151

Reporting back

- 29** After the October 28 closed session, council did not report back on the discussions. I encourage councils to report back on what occurred in camera, 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 together with 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 publicly.
- 30** As with the resolution to proceed in camera, council's report back should be captured in the public minutes.

Opinion

- 31** My investigation established that council for the Village of Westport contravened its procedure by-law by failing to provide adequate notice of the October 28, 2014 meeting.
- 32** I am making the following recommendations that I hope will help council improve the transparency of its closed meetings:

Recommendations

Recommendation 1

The Village of Westport should amend its procedure by-law to include how notice of special meetings is provided to the public.

Recommendation 2

The Village of Westport should ensure that adequate notice is provided of all special meetings, in accordance with the requirements of its procedure by-law.

Recommendation 3

The Village of Westport should ensure that its resolutions to proceed in camera provide a description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 4

The Village of Westport should ensure that public minutes are kept of closed meetings that capture the resolution to proceed in camera as well as any reporting back council conducts after reconvening into open session.

Recommendation 5

The Village of Westport should follow a practice of reporting back publicly after closed sessions.

Report

- 33** OMLET staff spoke with the Mayor and clerk on January 16 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 34** My report should be shared with council for the Village of Westport and made available to the public as soon as possible, and no later than the next council meeting.



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