



J. Paul Dubé, Ombudsman

August 5, 2016

By e-mail (manager@walkertonbia.ca)

Ms. Christine Brandt, Manager
Walkerton Business Improvement Area
101 Durham Street
P.O. Box 1344
Walkerton, ON
N0G 2V0

Re: Closed meeting complaint

Dear Ms. Brandt:

I am writing to provide you with the outcome of our review of a complaint received about the June 8, 2016 closed meeting held by the board of directors for the Walkerton Business Improvement Area (the Board). For the reasons outlined below, we have determined that subject matter discussed during the closed meeting fell within the permitted exceptions under the *Municipal Act, 2001*. However, we are making some suggestions to help improve the Board's closed meeting practices.

Authority of the Ombudsman

As of January 1, 2008, the *Municipal Act, 2001* (the Act) gives citizens the right to request an investigation into whether a municipality or local board has complied with the Act when holding a meeting that is closed to the public. Section 204(2.1) of the Act specifies that a board of management for a business improvement area is a local board of the municipality for all purposes. Accordingly, the Board is a "local board" of the Municipality of Brockton and its meetings are subject to the Act's open meeting requirements.

The Ombudsman is the closed meeting investigator for the Board.

Closed meeting complaint

Our Office received a complaint about the June 8, 2016 closed meeting of the Board. The complainant raised concerns that the Board improperly discussed possible changes to its by-laws in camera under the Act's closed meeting exception for "litigation or potential litigation" (section 239(2)(e) of the Act).

Review

In reviewing this complaint, we considered materials submitted by the complainant, the Board's procedure by-law, as well as the meeting agenda and open/closed meeting minutes. We also reviewed a staff report presented during the meeting, the related opinion from the municipal solicitor, and other relevant documentation. We spoke with you and the Municipality of Brockton's CAO/Clerk.

The June 8, 2016 meeting

On June 8, 2016, 12:00 p.m., the board of directors for the Walkerton Business Improvement Area met for a regular Board meeting. In accordance with the Board's standard practice, the meeting agenda was posted on its website one week prior to the meeting.

The agenda indicated that the Board would proceed in camera to discuss litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

The open session minutes state that council passed a resolution to proceed in camera for the reason outlined on the agenda. No further information was provided.

The closed session minutes show that the Board discussed a staff report and accompanying legal opinion that responded to issues raised in a letter written by the solicitor of a local business owner. As part of the discussion, the Board considered legal advice that commented on the Board's current practices.

The minutes, as well as our discussions with yourself and Brockton's CAO/Clerk, indicated that the Board had reason to believe that the local business owner would initiate legal proceedings if he were unsatisfied with the changes implemented in response to the letter from his solicitor.

Due to time constraints, the Board resolved to return to open session before it could agree on a response to the issues raised by the business owner's correspondence. The Board did not report back in open session regarding its in camera discussion. The meeting adjourned at 1:40 p.m.

Analysis

The June 8, 2016 meeting was closed under the "litigation or potential litigation" exception in section 239(2)(e) of the Act.

The meaning of "litigation or potential litigation" is not explicitly defined in the Act. However, as the courts have explained with respect to litigation privilege:

[i]t 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 [emphasis added]

In a report regarding the Village of Westport, our Office found that, although litigation had not been initiated at the time of the in camera discussion, there was sufficient reason for the municipality to anticipate that it was a realistic possibility.² Accordingly, council for the Village of Westport was entitled to rely on the “litigation or potential litigation” closed meeting exception.

In this case, the Board discussed its proposed response to various concerns identified in a letter from a business owner’s solicitor, as well as a related staff report and legal opinion. Our review indicates that the Board had reason to believe that the business owner would initiate legal proceedings if he were not satisfied with the Board’s response to his correspondence. Accordingly, the Board was entitled to rely on the closed meeting exception for “litigation or potential litigation” to discuss the staff report, legal opinion, and its proposed response to the business owner’s concerns.

Although not cited by the Board, it could also have relied on the closed meeting exception for “advice that is subject to solicitor-client privilege” (section 239(2)(f) of the Act) to discuss these matters in camera.

Procedural matters

During the course of our review, we noted the following procedural matters, which the Board should address, in order to improve its closed meeting practices.

Resolution

Section 239(4) of the Act requires that a resolution to proceed into closed session include the general nature of the subject matter to be considered. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*:

[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.³

¹ *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)).

² Ombudsman of Ontario, *Investigation into whether Council for the Village of Westport held an illegal closed meeting* (January 2015) at para 22, online: <http://www.ombudsman.on.ca/Files/sitemedia/files/Westport_2015_Final.pdf>.

³ [2007] OJ No 919, at p 151.

In this case, neither the agenda nor the resolution to proceed in camera provided any information about the subject matter of the discussion other than the exception authorizing the closed session.

The Board should ensure that resolutions to enter closed session provide the public with a general description of the subject matter to be considered in camera, while balancing the need to protect confidential and sensitive information from disclosure.

Report back

Numerous closed meeting investigators, including our Office, have recommended that municipalities adopt the best practice of reporting back.⁴ In a 2009 report regarding closed meetings in the County of Essex, Local Authority Services recommended that councils “report...in a general way, what happened at the closed session”.⁵

Following its closed session discussion on June 8, 2016, the Board did not report back in open session about its in camera meeting. During your conversation with our Office, you indicated that the Board has never provided this type of summary following its closed session discussions.

As a best practice, the Board should report back after closed sessions and provide general information about what occurred in camera. In some cases, public reporting might consist of a general discussion in open session of subjects considered in closed session. This might be similar to the information in the resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Procedure by-law

Section 238(2) of the Act requires that every municipality and local board adopt a procedure by-law to govern the calling, place and proceedings of meetings.

In a resolution dated September 10, 2014, the Board adopted the procedure by-law used by council for the Municipality of Brockton (by-law 2012-84)⁶.

⁴ Ombudsman of Ontario, *Investigation into whether council for the Municipality of Magnetawan held illegal closed meetings* (June 2015) at para 54, online: <http://www.ombudsman.on.ca/Files/sitemedia/files/FinalReport-Magnetawan_2015.pdf>.

⁵ Local Authority Services, *A Report to the corporation of the County of Essex* (September 2009) at 17, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

⁶ Corporation of the Municipality of Brockton, by-law no 2012-84, *Being a By-law to govern the calling, place and proceedings of the Council of the Corporation of the Municipality of Brockton and the Committees thereof* (13 November 2012).

While the Board clearly wishes to be governed by the same procedures as the municipality, adopting Brockton's procedure by-law does not accomplish this goal. As one would expect, Brockton's procedure by-law specifically indicates that it applies to council for the Municipality of Brockton and its committees. The by-law does not contain any provisions that apply to local boards generally or the Walkerton Business Improvement Area specifically. In addition, some of the Board's standard practices – such as its method for providing notice of upcoming meetings – are not accurately reflected in the procedure by-law. Further, the by-law has not been updated to reflect recent amendments to the Act's closed meeting exceptions.

The Board should review and amend its procedure by-law to ensure that it accurately reflects the specific practices followed by the Board, and that it contains the current closed meeting exceptions.

Conclusion

The June 8, 2016 closed meeting of the Board was permissible under the "litigation or potential litigation" closed meeting exception. The Board is encouraged to improve its closed meeting practices by implementing the suggestions and best practices set out above.

You indicated to us that this letter would be included as correspondence at the next available meeting of the Board.

We thank you for your co-operation during our review.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Paul Dubé". The signature is stylized with a large, sweeping initial "J" and a trailing flourish.

J. Paul Dubé
Ontario Ombudsman