



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

January 30, 2012

Mayor Marcel Guibord
The City of Clarence-Rockland
1560 Laurier Street
Rockland, ON
K4K 1P7

Re: Ombudsman Review of Closed Meeting Complaints

I am writing further to our conversation of January 9, 2012, concerning the results of the Ombudsman's preliminary review of complaints received regarding closed meetings.

One complainant alleged that council members improperly met between the May 18 and May 30 meetings to discuss council business. A second complainant alleged that council discussed tenders for legal services in closed session at a June 13 Committee of the Whole meeting, without prior notice.

During the course of our review of these complaints we spoke with you as well as members of council, and obtained relevant documentation including the open and closed session meeting materials. We also reviewed relevant provisions of the *Municipal Act, 2001* (the "Act") and the City's Procedure By-law (By-law 2004-40).

During our conversation on January 9 we summarized the results of our preliminary review and provided some suggestions regarding best practices with respect to future closed meetings, which we asked you to share with council.

Complaint regarding discussions that allegedly took place between the May 18 and May 30 Council Meetings about a legal matter

According to the open session minutes of the May 18 meeting, Council passed a resolution to proceed *in camera* to discuss two issues:

- Human resources matter, pursuant to directives given in the closed session of March 3rd 2011; and
- Human resources matter regarding the expectations of client services

With respect to the first “human resources” matter, the closed session minutes note that, while *in camera*, legal counsel provided an opinion to council on an ongoing legal matter.

The second matter discussed during the closed session pertained to concerns about poor quality client service being provided by some municipal departments. During this discussion, council voted to “mandate the Acting CAO...to take the necessary measures to ensure that the current situation is rectified.”

The agenda for the May 30 closed session indicated that council would convene in closed session to discuss three matters, including a “human resources matter pursuant to directives given in the closed session of May 18th.”

The closed session minutes note that the municipality’s legal counsel was also present at this session. According to the minutes, the Mayor explained that since the May 18 meeting, some members of council had raised concerns about the directions council gave to legal counsel at that closed session. Accordingly, the legal issue discussed at the May 18 meeting was being brought back for further discussion.

The Mayor also noted that some discussions regarding the legal matter took place between him, legal counsel for the municipality, and Councillor Desjardins, since the May 18 meeting. You advised our office that council mandated the Mayor and Councillor Desjardins to liaise with legal counsel on this matter. You provided the minutes from the March 3 meeting, at which this decision was made.

The complaint to our office alleged that it was inappropriate for members of council to discuss the legal matter with the mayor, outside of formal council meetings.

We interviewed members of council and reviewed the open and closed session minutes from these two meetings. The majority of those we interviewed could not recall having any informal discussions about the legal matter between the May 18 and May 30 sessions. Three members of council, however, did advise our office that they discussed this matter with each other and with the Mayor some time between May 18 and May 30.

These three members of council advised our office that they had concerns about certain information provided regarding the legal issue on May 18, and they were hoping for further clarification at the next meeting. They all agreed to bring these concerns to the Mayor’s attention.

Analysis:

According to the information provided to our office, three councillors met with the Mayor some time after the May 18 meeting to discuss their concerns about the way a legal matter was being dealt with, and to request further clarification at a future closed session. We understand that only four members of council (three councillors and the mayor) were present for this discussion; accordingly, a quorum of council was not present.

When we spoke on January 9 we noted that the presence of quorum is not determinative in deciding whether a particular discussion constitutes a “meeting” for the purpose of the open meeting requirements. The Ombudsman has provided the following definition of “meeting”:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

It does not appear that the council members met between May 18 and May 30 to lay the groundwork for future decision-making, but rather to express to the Mayor that they needed more information and clarification about this legal issue. Because of these concerns, legal counsel attended the May 30 meeting to provide this clarification.

While we did not find that this gathering violated the open meeting requirements, we did note that informal gatherings of council members naturally attract speculation about the scope of the discussions taking place. Council members should be extremely careful to ensure that these conversations do not go beyond permissible limits, such that they could be seen as laying the groundwork for the future decision making of council.

We also discussed that the discussion regarding “poor quality client services” that took place on May 18 does not appear to come within the permissible exceptions for a closed session. Certain “human resources” matters might be appropriate for discussion in closed session, but **only** if they fall within one of the statutory exceptions outlined in s. 239 of the Act.

For instance, a municipality might properly close a meeting to discuss a human resources matter if it clearly involves discussions of “personal matters about an identifiable individual” (s. 239(2)(b)) or “labour relations or employee negotiations” (s. 239(2)(d)). However, while the performance of a specific employee might properly be discussed behind closed doors, there is no exception to the open meeting provisions allowing for

closed session discussion of the overall performance of a particular department. In the future, council should ensure that all matters discussed *in camera* fall squarely within the exceptions to the open meeting provisions.

We also noted that, although “Human Resources Matter” was listed as the subject matter for the May 18 and May 30 closed session discussions, no listed exception under s. 239 of the Act was cited. We discussed that council is not required under the Act to cite the specific exception authorizing a closed session, unless a session is closed under the “educational or training” exception (s. 239 (3.1)). However, for the sake of clarity, it is helpful to specifically state the exception on which council is relying when proceeding *in camera*.

Complaint regarding discussions that allegedly took place after the May 18 meeting about a tender for legal services

We understand that in the spring of 2011 council was in the process of requesting proposals for a legal services contract with the Municipality. In open session on March 14, council voted to mandate municipal staff to “tender for the litigation services and legal counsel as well as real estate transactions.” Administration subsequently requested bids for these legal services.

You advised our office that there was some confusion regarding the terms of reference for the bidding process. Council was not in agreement with the manner in which bids had been requested, and consequently some councillors did not want to open the bids that had been received.

On May 19, several days before the deadline for submissions, the Mayor sent an email to all of council. A copy of this email was obtained and reviewed by our office. The email stated that, after a discussion with the majority of council, it had been agreed that the bids received in response to the tender process for legal services would be stamped with the reception date but would not be opened without council's approval.

We understand that after consulting with legal counsel *in camera*, council directed staff to open the bids.

The complainant alleged that the May 19 email demonstrated that a “majority of council members” engaged in substantive discussions about council business (namely the legal services contract), outside of a formal council meeting, and behind closed doors.

Our office spoke with members of council, including the Mayor, regarding this allegation. The Mayor advised that it was “possible” he had sent this email, but he had no specific recollection of doing so. He only recalled that one member of council expressed concerns about opening the bids.

One member of council advised our office that he may have spoken to the mayor on the phone about this issue, but could not recall any specifics of this conversation. No other member of council with whom we spoke recalled discussing the legal services contract outside of a council meeting, or could provide further information about the circumstances that gave rise to the May 19 email.

It is possible for individual members of council to have informal discussions about council business outside of formal meetings without necessarily running afoul of the open meeting requirements. However, there is always a danger that such discussions will cross over the line.

Sequential discussions amongst council members whether in person, by telephone or through electronic means, for the purpose of exercising the power or authority of council or for the purpose of doing the groundwork necessary to exercise that power or authority will constitute a meeting subject to the open meeting requirements.

If the mayor had, as his May 19, 2011 email suggests, communicated privately with the majority of council and arrived at a consensus about how to address the tender process, this would represent a closed meeting held in violation of the *Municipal Act*.

While based on the available evidence, we were unable to clearly substantiate that an improper closed meeting took place relating to the tender process for legal services, council members should exercise caution in future and generally refrain from discussing council business unless the open meeting rules have been observed.

Complaint regarding a discussion about a tender for legal services at the June 13 Committee of the Whole Meeting

The complaint to our office alleged that a discussion regarding tenders for legal services took place in closed session on June 13, when the agenda did not advise that the item would be discussed *in camera*.

The agenda for the June 13 meeting does not list a closed session, nor does it list the legal services tender as being an item for discussion. The minutes for the June 13 meeting note that at the beginning of the meeting, in open session, council voted to amend the agenda.

Two items were withdrawn, and four items were added, including item 13.6 – “Tenders for legal services”. The minutes do not state that item 13.6 would be discussed in closed session. You advised our office that items can be added to the agenda at the last minute if council votes to do so. This process is not covered in the procedure by-law.

The open session minutes indicate that, after voting to amend the agenda, council passed a resolution to proceed *in camera* “in order to hold a closed session with respect to the tender for legal services to receive legal advice, as provided in section 239 of the Municipal Act, 2001.” While in closed session, council discussed a written legal opinion from the municipality’s solicitor regarding the tender issue.

When the open session resumed, council passed a resolution to grant the contract for real estate transactions to Charron Langlois LLP and to reject all tenders for legal advice and litigation.

Analysis:

As discussed on January 9, it appears that council can and does add items at the last minute, without notice to the public. The process for doing so is not included in the municipality’s procedure by-law.

It also appears that, until council passed the resolution to proceed *in camera*, the public had no notice that the items added to the agenda on June 13 were closed session items, rather than open session items.

When we spoke we noted that adding items to an agenda without any prior notice runs the risk of undermining the public’s right to know what items will be discussed at a council meeting, so they can exercise their right to attend and be aware of council business. Consistent with the principles of openness, transparency and accountability that underlie the open meeting requirements, council should generally 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.

We suggested that council amend its procedure by-law to require a formal resolution suspending the normal meeting rules before a new item can be added to a meeting agenda.

During our discussion you indicated general agreement with the observations and suggestions made by our Office and a willingness to share our comments with Council.



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We would appreciate your notifying us once this has occurred and advising us of any steps that Council intends to take to address these matters. We will also be notifying the complainant of the results of our review.

I would also like to take this opportunity to thank you for the cooperation our Office received during this review.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Michelle Bird
Legal Advisor
Open Meeting Law Enforcement Team