

June 10, 2013

Mayor John Close and
Clerk Angie Cathrae
Town of South Bruce Peninsula
315 George Street
P.O. Box 310
Warton, ON N0H 2T0

Dear Ms. Cathrae,

Re: Complaints about closed meetings held between September 4, 2012 and January 15, 2013

I am writing further to our conversation on May 27, 2013 about our review of a complaint that Council held a number of closed meetings between September 2012 and January 15, 2013 to discuss legal matters that did not affect the Town and/or with which the Town was not directly involved.

The complaint alleged that, on seven occasions, Council improperly considered items in closed session under the “litigation or potential litigation” and/or “advice that is subject to solicitor-client privilege” exceptions to the open meeting requirements. The closed sessions identified in the complaint took place on September 4, October 16, November 6, November 20, December 4, and December 18, 2012 and on January 15, 2013.

As you know, the *Municipal Act, 2001* (the Act) requires meetings of Council, Local Boards, and their committees to be open to the public, with limited exceptions. In reviewing this complaint our Office spoke with you, obtained and reviewed the meeting agendas and minutes, and considered the Town’s Procedure By-Law and the relevant sections of the Act.

A summary of our review is provided below:

Complaint- Meetings Improperly Closed under “Litigation” Exception

In regard to the September 4, November 6, December 4, and December 18, closed sessions, the complaint alleged that the litigation matter(s) scheduled for the closed

meeting did not involve or affect the municipality and, therefore, the subject matter discussed did not qualify for closed meeting consideration under the cited exception of the Act –s. 239 (2) (f) – *litigation or potential litigation, including matters before an administrative tribunal, affecting the municipality or local board.*

The public meeting minutes for the above noted meetings showed that, in each case, Council passed a resolution to proceed in camera and the resolution provided the general nature of matters to be discussed, as required by the Act.

For all but the November 6, 2012 meeting, Council advised in the resolution that it intended to discuss a “litigation update” under s. 239 (2) (f). With respect to the November 6, 2012 closed meeting, Council’s resolution to proceed in camera indicated that council would discuss litigation with respect to the Dynamic Beach By-Law.

The closed meeting records showed that, in all cases, the subject matter discussed in closed session focused on one or more active or potential lawsuits in which the Town and/or staff acting on behalf of the Town are named as respondents. The closed meeting discussions included status updates on pending litigation and discussion about next steps.

Analysis

Given the above information, including the fact that all closed meeting discussions focused on information pertaining to ongoing or potential litigation, we concluded that the “litigation” exception was appropriately applied.

Further, we did not identify any procedural violations that needed to be addressed.

Complaints that Solicitor-Client Privilege did not Apply to Closed Meeting Discussions

The complaint alleged that Council’s closed meeting discussions held on October 16 and November 20, 2012 and January 15, 2013, were improperly closed under exception 239 (2) (e) – *advice that is subject to solicitor-client privilege.*

In relation to the October 16, 2012 and January 15, 2013 Council meetings, the complainant alleged that the “solicitor-client privilege” exception did not apply because there was no pending litigation involving the Town (based on the subject matter identified in the resolution) for which Council required advice.

For the October 15, 2012 meeting, the Agenda and resolution to proceed in camera indicated that Council intended to discuss the Dynamic Beach By-Law under the solicitor-client privilege exception.

The closed meeting record confirms that the Clerk presented correspondence from the Town's Solicitor, Steven O'Melia, dated October 15, 2012 outlining his position on the enforceability of the Dynamic Beach By-Law.

When Council returned to the open session it passed a resolution to waive solicitor-client privilege and release both the October 15, 2012 legal opinion and a previous opinion on the Dynamic Beach By-Law received in 2009 from Solicitor Donald Greenfield.

With respect to the January 15, 2013 closed session, Council passed a resolution to proceed in camera to consider, among other things:

Advice that is subject to solicitor-client privilege, including communications necessary for that purpose AND personal matters about an identifiable individual, including municipal or local board employees (Indemnification By-Law)

The Clerk advised and the closed meeting record confirmed that Council reviewed a legal opinion from the Town's Solicitor about an Indemnification By-Law. Council also reviewed correspondence issued by a third party to a resident under the "personal matters" exception.

In regard to the November 20, 2012 meeting, the Agenda and resolution indicate that Council held a closed meeting with respect to:

Advice that is subject to solicitor-client privilege, including communications necessary for the purpose AND litigation or potential litigation, including matters before administrative tribunals affecting the municipality or local board (Litigation and Insurance Considerations)

The meeting record shows that Council discussed the Solicitor's legal opinion with respect to how to respond to a number of lawsuits filed against the Town and/or municipal officials or staff.

The complainant also alleged that an improper vote took place in the November 20, 2012 closed meeting. We did not however find any evidence that such a vote occurred.

Analysis

Council is permitted under the “solicitor-client privilege” exception to review or receive legal advice. It is not necessary that the advice pertain to litigation, although with respect to the November 20, 2012 meeting the advice received dealt with litigation matters.

The criteria required for solicitor-client privilege to apply, as set out in the Supreme Court of Canada decision, *Solosky v. The Queen*, [1980] 1 S.C.R. is:

- i. a communication between solicitor and client;
- ii. which entails the seeking or giving of legal advice; and
- iii. which is intended to be confidential by the parties.

Despite the fact that Council decided to waive privilege following the October 16, 2012 closed session, at the time of the meeting Council sought legal advice which was intended to be confidential and, therefore, the subject matter falls within the ‘solicitor-client privilege’ exception.

The information provided also confirms that Council received advice from the solicitor during the November 20, 2012 and January 15, 2013 closed meetings on municipal matters and the advice was intended to be confidential. As such, the subject matter discussed at all three meetings qualifies for closed meeting consideration under the exception cited.

During our discussion on May 27, 2013 we asked that this letter be shared at the next public council meeting on June 18, 2013 and a copy made available to the public.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team