

July 19, 2011

Mayor John Close
Angie Cathrae, Clerk
Town of South Bruce Peninsula
315 George Street, PO Box 310
Warton, Ontario
N0H 2T0

Dear Mayor Close and Ms. Cathrae:

Re. Our File No. 237058

I am writing further to our meeting of June 6, 2011, regarding our Office's review of the complaints received about regularly scheduled closed meetings held by the Council of South Bruce Peninsula from January through March 2011. We would also like to take the opportunity to provide some "best practices" suggestions for future closed meetings. As we explained, the complainant raised several concerns about Council's closed meeting practices, including that Council discussed issues in closed sessions that could have been discussed in open session; that Council failed to cite the proper exception for closed-session discussions; and that Council improperly reached a consensus in closed session.

As part of our Office's review of these complaints we met with both of you, as well as the Chief Administrative Office and Deputy Clerk, and reviewed the meeting materials of the meetings that are the subject of this complaint. We reviewed the municipality's Procedure By-law (56-2011), as well as relevant sections of the *Municipal Act, 2001* (the Act). We also attended an open session of Committee of the Whole on June 7, to provide information regarding the Sunshine Law and our Office's process for reviewing closed meeting complaints.

Items discussed in camera that could have been discussed in open session

When we met on June 6 we provided some examples of items that were discussed during *in camera* meetings, which properly could have been discussed in an open session. During a

January 4, 2011 Committee of the Whole meeting, the Committee proceeded *in camera* under the solicitor-client privilege and personal matters exceptions. While *in camera* Council discussed “the receiving of closed session information” and that closed session information should not leave Town Hall. This discussion did not fit within the exceptions to the open meeting requirements listed in the closed session resolution, nor did it fit within any of the closed meeting exceptions outlined in the Act.

We also discussed with you Council’s closed-session discussions regarding a “blog”, which were closed under the exception of “personal matters” at the January 4, 2011 meeting. While discussions that include personal, identifying information about staff members discussed on this blog might fall within the exception, Council should consider that the material on the blog is already public knowledge. Any information that is already public or can properly be shared with the public should be discussed in open session.

At the January 11, 2011 Council meeting, discussions about “Bill 168” were held in closed session under the “personal matters about an identifiable individual” exception. When we met on June 6 you advised that these discussions involved the Mayor reminding Council about their obligation to ensure that staff are provided with a harassment-free work environment and to adhere to the Ontario Human Rights Code. Part of the discussion also involved an identified staff member. Although identifying remarks made about specific individuals may be suitable for discussion under this exception, the Ombudsman is of the view that the exceptions to the open meeting requirements should be narrowly construed; accordingly, general remarks about Bill 168 and the Human Rights Code should have been discussed in open session.

When we spoke on June 6, 2011, we noted that Council must strictly follow the legislative requirements and issue a public resolution permitting discussion of a specific exception, before it can be discussed behind closed doors. If the resolution is silent regarding a particular matter, Council is prohibited from discussing it. Council should also be vigilant in ensuring that there are not topics of discussion introduced in a closed session that stray from the protections that would otherwise be afforded by the closed meeting exception.

Failure to cite the proper exception

We also provided some examples of items discussed during closed sessions, while they may have been appropriate for an *in camera* discussion, did not appear to fit within the exception cited in the closed session agenda or the resolution to proceed *in camera*.

At the February 1, 2011 Committee of the Whole meeting, the Committee proceeded *in camera* under the “security of the property” exception, to discuss a local airport hangar. When we spoke on June 6 you advised that part of the discussion involved the fact that the Town may be selling property, and there also might be a litigation issue involving this property. We noted that the

Ombudsman is of the view that the “security of property” exception should be narrowly construed, and should be interpreted in accordance with its plain meaning. In reviewing a meeting of the City of Greater Sudbury’s Audit Committee our Office noted:

...the *Municipal Act* does not provide a definition of “security of the property”. However, a recent decision of the Information and Privacy Commissioner considered this term and can provide some guidance. The decision stated, “In my view, ‘security of the property of the municipality’ should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property.”

Therefore, it does not appear that the February 1 discussion of the airport hangar could properly fit within the plain meaning of this exception. We noted that the “acquisition/disposition of land” exception might have been appropriate for this discussion. If a potential litigation matter also was being considered, this should have been cited in the resolution as well.

During the course of our review, we also noted that Council proceeded *in camera* under the “solicitor-client privilege” exception at several meetings. When Council holds closed sessions discussions under the “solicitor-client privilege” exception, it should ensure that all discussions taking place under this exception fit within the narrow scope of the exception. In the Ombudsman’s January 30, 2009 report, “Municipal Government By Stealth”, regarding his investigation into a complaint about a closed meeting of Council of the Township of Emo, the Ombudsman stated: “The exception concerning privileged advice can only be used when some advice from a solicitor or related communication actually exists for council’s consideration.”

As an example, we noted that on January 11 and February 18, Council discussed the Sauble Medical Clinic under the solicitor-client privilege exception. We discussed that it was not clear from the closed or open session minutes whether a specific piece of advice from the Town’s solicitor was being considered, or whether the solicitor was present at these meetings. When we met on June 6 you advised that there was, in fact, a specific communication from a solicitor being considered at those meetings. We suggested that, in the future, it would be helpful for the minutes to reflect this, to provide clarity regarding why a particular discussion is being closed under the solicitor-client privilege exception.

Reaching a consensus while in camera

The closed session minutes for the March 7 Committee of the Whole meeting indicate that, while in closed session, the Committee voted on which members would sit on a performance review committee. When we met on June 6 we discussed that s. 244 of the *Municipal Act, 2001* mandates that votes must be taken in open session, subject to the narrow exception outlined in s. 239(6) of the Act, which permits voting in camera for procedural matters or for giving directions

to staff. It appears that the March 7 vote was not for a procedural matter or for giving direction to staff, and as a result should have been held in open session. In the future, Council should ensure that all decision making takes place in open session, subject to the narrow exception.

Procedural Matters

We noted that it appears that Council does not always report back on all items discussed during a closed session. For example, at the January 18 meeting Council discussed an item under the litigation or potential litigation exception (Genivar Correspondence); there was no mention of this item in the open session minutes following the closed session.

We discussed that the Ombudsman is of the view that Council should report back to the public on all items discussed during a closed session, at least in a general way. This should occur even if there are no motions or directions resulting from a particular closed session discussion. You advised that it is Council's general practice to report back after a closed session, and that this might have been an oversight.

When we spoke with you on June 6, 2011, you committed to publicly share the findings of our review with Council and with the public. We request that you notify our Office when this occurs. We will also be notifying the complainant of the results of our informal review.

I would like to take this opportunity to thank you for the cooperation our Office received during this review and for inviting us to make a presentation to Council at its June 7, 2011 Committee of the Whole meeting.

Sincerely,

Michelle Bird
Ombudsman Ontario