

April 9, 2014

Mayor Tom Laughren and
Clerk Steph Palmateer
City of Timmins
220 Algonquin Boulevard East
Timmins, ON P4N1B3

Dear Mayor Laughren and Clerk Palmateer,

Re: Closed Meeting Complaint – September 25 & October 28, 2013 Closed Sessions

I am writing further to our conversation on April 8, 2014, regarding the outcome of our review of a complaint that Council met in closed session on September 25, 2013, to discuss the wastewater plant upgrade, and on October 28, 2013, to discuss wage increases. The complaint alleged that these meetings were not permitted under the exceptions contained in the *Municipal Act, 2001*.

As you know, the *Municipal Act* requires council, local board, and committee meetings to be open to the public, with limited exceptions and subject to certain procedural requirements.

In reviewing this complaint, our Office obtained and reviewed the meeting documentation, including the agenda, minutes of the open and closed sessions, a PowerPoint presentation and a webcast of a related public Council meeting. We also spoke to staff and Council members and considered the relevant sections of the City By-Laws and the *Municipal Act*.

Meeting Procedure

According to Procedure By-Law (2007-6570), regular meetings of Council are held on the second and fourth Mondays of each month, except in summer, when meetings are held only as necessary. Any closed session is usually held prior to the regularly scheduled Committee of the Whole and Council meetings.

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A separate Notice By-Law (2007-6566) provides for posting of public notice of Council meetings in the local newspaper and the City's website.

September 25, 2013 Closed Meeting

Notice of the September 25, 2013 Council meeting was advertised in the local newspaper on September 20, 2013 and on the City's website. The Agenda posted in the newspaper included reference to a 5:00 p.m. *in camera* meeting on "potential litigation." The closed meeting agenda posted to the website included a resolution to go *in camera* and referred to a presentation on the wastewater plant upgrade.

The Mayor and seven of the eight other Council members were in attendance at the meeting on September 25, 2013. The Clerk, the Chief Administrative Officer, the Deputy Treasurer, the Director of Engineering and another staff engineer also attended, as well as two consulting engineers from the firm retained by Council to administer the wastewater plant upgrade.

The closed minutes show that Council, citing s. 239 of the Act, passed a resolution at the outset of the meeting to go into closed session to discuss potential litigation. They reflect that Council received an update from the City's engineering staff relating to the wastewater plant upgrade, and based on this information, considered taking legal action against a specific party connected with this project.

In addition, through interviewing individuals present at the meeting, we learned that subsequent to the staff engineers' presentation and Council's initial discussion about initiating litigation, the consulting engineers entered the meeting and provided a brief PowerPoint presentation on the project, which was not referred to in the minutes. The consulting engineers then left the meeting and Council continued to discuss the project in connection with potential litigation.

The meeting minutes state that Council made a decision regarding the project. However, upon reviewing his handwritten notes for the meeting, the Clerk later acknowledged this was in error. Witness interviews supported that there was no decision made about the project during the meeting. Rather, Council acknowledged that the matter would return for a decision when further information was available. Accordingly, Council received another update about the status of the project in public session at the Committee of the Whole meeting on March 31, 2014.

Analysis

Notice of the September 25, 2013 closed session complied with the City's Procedure and Notice By-Law.

The *Municipal Act* requires that a resolution authorizing a closed session include reference to the general nature of the matter to be considered (s. s.239(4)(a)). The court in *Farber v. Kingston (City)*, (2007) 279 D.L. R. (4th) 409 (Ont. C.A.), found that the resolution should provide a general description of the issues to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Council's resolution to proceed *in camera* noted that Council intended to discuss potential litigation, but provided no further detail on the general nature of the matter to be discussed (for example, regarding the wastewater plant upgrade, as stated on the agenda posted on the City's website).

Our Office reviewed whether the subject matter discussed in closed session qualified for closed meeting consideration under the "litigation or potential litigation" exception to the open meeting requirements (s. 239(2)(e)).

The *Municipal Act* does not specifically define what constitutes "litigation or potential litigation." However, the case law on litigation privilege provides assistance in interpreting this phrase under the *Municipal Act*. The Supreme Court of Canada has observed that litigation privilege is intended to "ensure the efficacy of the adversarial process... to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending position in private, without adversarial interference and without fear of premature disclosure."¹

Litigation privilege also applies in the context of *anticipated* litigation. The courts have found that:

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 in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation."²

While litigation privilege typically protects communications between a lawyer and third persons (or between a lawyer and a client), litigation privilege also protects communications prepared by a prospective litigant, even in the absence of a lawyer, if the relevant criteria are met.³

¹ *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319 at para. 27.

² *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.)).

³ *Supra* note 1 at para. 32.

The Ontario courts have also held that litigation privilege may cover situations where litigation was considered but decided against.⁴

In this case, the meeting minutes and witnesses indicated that Council did contemplate taking legal action against specific parties in connection with the wastewater plant upgrade and were not merely speculating about the possibility of future litigation.⁵

Under the *Municipal Act*, council meetings must be recorded (s. 239(7)). In this case, the meeting minutes did not specifically list all those in attendance, did not describe the presentation by the consulting engineers, and mistakenly recorded that a decision was made.

Conclusion

The September 25, 2013 closed session to discuss potential litigation with respect to the wastewater upgrade project was permitted within the exception under s.239(2)(e) of the *Municipal Act*.

As a best practice, Council should ensure that its resolutions not only cite the applicable exception in the *Municipal Act* relied on to authorize a closed session, but when possible, provide additional detail describing the nature of the subject matter to be considered.

Council should also ensure, as a best practice, that its minutes are accurate and complete, including identifying those who attended the meeting, and their times of arrival and departure. Our Office previously recommended in a letter of November 14, 2013, that Council consider audio or video recording both its open and closed meetings. We urge Council to adopt this practice, in order to ensure greater accuracy of its meeting records.

October 28, 2013 Closed Meeting

Notice of the October 28, 2013 Council meeting was given in the local newspaper on October 25, 2013 and on the City's website. The agenda posted in the newspaper included reference to the 5:00 p.m. *in camera* meeting on "labour relations or employee negotiations". The closed session agenda posted on the website included a resolution to

⁴ See *CIT Financial Ltd. V. JDS Uniphase Corp.* (2003), 124 ACWS (3d) 455 (Ont. S.C.J. Case Mgt Master

⁵ For an example of where our Office has found that the discussions did not qualify as "anticipated litigation" see Town of Amherstburg – Feb 10, 2011 Report.

go *in camera*, adoption of *in camera* minutes and an annual wage increase for Council and non-union staff.

The City's Non-Union Wage Increase Procedure By-Law (2009)-6842 establishes that wage increases for non-union staff will be based on an average of the increases provided to unionized workers. The By-Law also provides that Council retains the discretion to vary the amount of the non-union increase. The Director of Human Resources explained that it has been the City's practice for more than eight years to link Council members' salaries to the non-union salary increase.

According to the minutes and witness interviews, all eight members of Council were present at the meeting on October 28, 2013, as were nine members of staff.

Our review of the closed meeting minutes shows that Council passed a resolution at the outset of the meeting to go into closed session to discuss labour relations or employee negotiations, citing s. 239 of the *Municipal Act*.

Subsequently, the Director of Human Resources presented his report on the rate increase. There was no discussion specific to Council salary increases separate from consideration of the general rate to apply to non-union staff.

Council later made a decision on the salary rate increase at a public meeting on January 15, 2014.

Analysis

Notice of the October 28, 2013 closed session complied with the City's Procedure and Notice By-Law.

While the public agenda said Council would be considering the annual wage increase for Council and non-union staff, Council's resolution to proceed *in camera* only referred to "labour relations and employee negotiations."

The *Municipal Act* authorizes Council to consider matters relating to "labour relations or employee negotiations" in closed session (s. 239(2)(d)).

There are no reported court cases interpreting the "labour relations or employee negotiations" exception in the *Municipal Act*. In the context of Ontario's information and privacy legislation, certain records relating to "labour relations and employment related matters" are not accessible to the public. Although the law that has developed under the freedom of information regime is not binding on our Office when considering the *Municipal Act*, the principles applied provide some guidance.

The Ontario Court of Appeal has found that the ordinary meaning of the phrase “labour relations” in the *Freedom of Information and Protection of Privacy Act* extends to relations and conditions of work beyond those of collective bargaining, including remuneration outside of a traditional employment arrangement.⁶

Similarly, another closed meeting investigator found that the “labour relations and employee negotiations” exemption applied in a 2013 case involving consideration of a vacation benefit for non-unionized employees of the City of Markham.⁷

Under the circumstances, Council’s consideration of the salary increase for non-unionized employees in closed session was authorized by the “labour relations and employee negotiations” exception under the *Municipal Act*.

However, Council members are not City employees. Council cannot use the exception in s. 239(2)(d) to consider its own remuneration in closed session (see the Ombudsman’s findings on a similar situation in Leeds and Thousand Islands, April 18, 2012⁸)

The only exception to this prohibition is when council and non-union staff remuneration is linked and there is no separate consideration of council salaries.

Conclusion

In this case, it was the City’s long-standing practice to link council salaries to non-union staff salary rates. There was no discussion in closed session specific to Council member salaries; had there been, it would have been a violation of the *Municipal Act*. The closed session was followed by public debate and decision on the issue on January 15, 2014. Under the circumstances, the discussion of non-unionized staff salaries was permitted under the exception in s. 239(2)(d). However, given the important public interest in council members’ remuneration, discussion of council member salaries and increases should always be done in an open and transparent fashion, and in a public forum.

⁶ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.) considering s. 65(6)3 of the *Freedom of Information and Protection of Privacy Act*.

⁷ See “Report to the Council of the City of Markham Regarding the Investigation of Closed Meetings of Markham Council and Its General Committee”, Amberly Gavel Ltd., March 2013, regarding closed meetings held on December 5 and 13, 2011.

⁸ The Ombudsman’s findings are contained in a letter to the Township clerk that can be found here: <http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Leeds---Thousand-Islands---Jan-23.pdf>

Council is reminded that, as a best practice, it should ensure that its resolutions provide sufficient detail to describe the general nature of the subject matter to be considered behind closed doors, rather than simply reciting the wording of the exception relied on to authorize going *in camera*.

Public Report

During our discussion on April 8, 2014, I explained our review and findings and provided you with an opportunity to provide feedback. You acknowledged our findings and did not raise any objections to our conclusions.

You agreed to include this letter on the agenda for the next public Council meeting, to be held on April 14, 2014, and to post a copy of it on your website.

Thank you for your cooperation with our review.

Sincerely,

Genevieve Currie
Legal Advisor
Open Meeting Law Enforcement Team