

May 24, 2012

Ms. Anita Weatherell
Deputy Clerk
Township of Tiny
130 Balm Beach Road West
Tiny, ON L0L 2J0

Dear Ms. Weatherell:

Re: Complaint Regarding Closed Meetings re: Legal Appeal

I am writing further to our conversation on May 23, 2012 regarding the results of the Ombudsman's review of a complaint that Council held closed meetings to discuss an appeal of a December 23, 2011 Ontario Superior Court decision -*Township of Tiny v Battaglia et al.* The complaint received was that the subject matter should be discussed in an open meeting as the public is aware of the court decision and any legal action taken by the Town has a financial impact on ratepayers.

The Ombudsman is the closed meeting investigator for the Township of Tiny. In reviewing this complaint, our Office spoke with you and reviewed the agendas and minutes for the January 9, March 12, and March 26 meetings, in addition to the Township's Procedure By-Law and sections of the *Municipal Act, 2001* (the Act).

As you know, the Act requires that all meetings of Council, local boards, and their committees shall be open to the public, with limited exceptions. In reviewing closed meeting complaints, the role of our Office is to assess whether or not Council was permitted to rely on one of the exceptions to the open meeting requirements in order to meet in closed session. We also can review whether appropriate procedures were followed.

You confirmed that the Committee of the Whole discussed the December 23, 2011 court decision during the in-camera portion of meetings on January 9, March 12, and March 26, 2012.

According to the Township's Procedure By-Law, Committee of the Whole meetings are held at 9:00 a.m. on the second and last Monday of each month. The Committee of the Whole is comprised of the five members of Council. The Agenda for the meetings is posted on the Township's website at least 48 hours prior to the meeting.

January 9, 2012 Committee of the Whole Meeting

The Agenda for the Committee of the Whole (the Committee) meeting included notice that the Committee would discuss in-camera, a) advice that is subject to solicitor-client privilege and (b) litigation or potential litigation.

The public minutes state that the Committee resolved to move in-camera during the open session and cited the exceptions above. No additional information was provided to the public about the nature of the meeting.

The minutes for the in-camera meeting show that the Committee members met with legal counsel and received advice and legal opinions on a number of legal matters, including the December 23, 2011 *Township of Tiny v Battaglia et al.* decision.

During the open Council meeting held at 7:00 p.m. on January 9, Council passed a motion to instruct legal counsel to file a notice of appeal of the *Battaglia* decision with the Ontario Court of Appeal.

Analysis

The Act permits Council or Committees of Council to hold closed meetings to discuss "litigation or potential litigation..." and/or to seek "advice that is subject to solicitor-client privilege", pursuant to s. 239 (2) (e) and s. 239 (2) (f) respectively. Based on the minutes of the closed meeting, the Committee's discussion fell within these permitted exceptions.

The Committee resolved in the public meeting to move in-camera and cited the exception authorizing the closed meeting, consistent with the requirements of the Act. However, as discussed, the Act requires that municipalities state within the resolution "the general nature of the matter to be considered at the closed meeting."

A 2007 Ontario Court of Appeal decision, *Farber v. Kingston (City)*, specifically addressed the level of detail that should be included:

...the 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...”

As we discussed, in the interest of transparency, the Township could likely have, in this case, provided a reference to the litigation/decision being discussed without disclosing the substance of the matters under consideration in the closed meeting. Providing additional information in the resolution and reporting back on the discussion once returning to the public meeting, where possible, without disclosing the specifics of the privileged discussions, may also help to prevent public speculation about the topics being discussed in closed meetings.

March 12, 2012 Committee of the Whole Meeting

The Agenda for this meeting did not include an in-camera session. However, the public minutes state that the Committee passed a motion to hold a closed meeting to discuss “litigation or potential litigation/advice that is subject to solicitor-client privilege”.

The closed meeting minutes indicate that the Chief Administrative Officer provided an update to the Committee on the status of the appeal and relayed advice from the Township’s Solicitor regarding information related to the litigation.

Analysis

Based on the content of the closed meeting minutes, the matters discussed during the closed meeting on March 12, 2012 appear to fall within the cited exceptions of litigation/potential litigation and advice that is subject to solicitor client privilege. The Committee was discussing litigation and the advice received from the solicitor.

In regard to notice, the *Municipal Act* requires that municipalities’ Procedure By-Law provide for public notice of meetings. However, the Act does not define the content of that notice.

The Township of Tiny’s Procedure By-Law does provide for public notice – the Agendas for the Committee of the Whole meetings are posted on the Township’s website at least 48 hours prior to the meeting.

In this case, the Agenda was posted to the website the Friday prior to the Monday meeting, but it did not include the closed meeting discussion. Although the Procedure By-Law does not define a process for adding items to the Agenda, you advised our Office that Council’s practice is to review and approve the agenda at the beginning of each meeting. The Mayor then asks Council members and staff if there are any additional

items to be discussed. If so, the item is added under “New Business” and a motion is presented to seek Council approval of the agenda, as amended.

According to the March 12, 2012 public minutes, a motion was put forward to approve the agenda with the added closed meeting item: litigation or potential litigation/advice that is subject to solicitor-client privilege. The motion was carried unanimously.

During our conversation on May 23, 2012, we provided some “best practice” suggestions regarding adding items to the agenda. As discussed, the Ombudsman generally recommends that municipalities list all items on the agenda and that additional topics only be considered in urgent circumstances. This practice helps to foster transparency, and to ensure that those who may wish to attend a meeting at which a particular topic will be discussed will have advanced notice. In this regard, we suggested that the Township add an Article to the Procedure By-Law confirming the process adopted by Council in order to add an item to the agenda.

March 26, 2012 Committee of the Whole Meeting

The Agenda for the March 26 meeting includes notice that a closed meeting would be held to discuss “litigation or potential litigation”. There is no additional information provided in the Agenda or the public minutes about the nature of the meeting.

The minutes state that, prior to passing a resolution to move in-camera, Committee members had a lengthy discussion (30 minutes) about whether the subject matter was appropriate for a closed meeting. While some Councillors argued that the information was suitable for public discussion, it was ultimately determined that since the topic related to the ongoing litigation and because a proposal (described below) contained confidential information regarding fees, it should be discussed in a closed meeting.

The closed meeting minutes indicate that the Committee’s in-camera discussion focused primarily on the community’s reaction to the December 23, 2011 court decision. The Committee also considered a proposal received from a communications company offering to assist with public communication strategies. These topics were later discussed at an open meeting of Council on April 10, 2012. You advised our Office that because these matters pertained to the court decision and the proposal quoted the fees for service, these issues were ultimately deemed appropriate for a closed meeting.

Based on the minutes of the meeting, Council did not provide any report on what was discussed in the closed meeting after returning to the open session.

Analysis

The closed meeting minutes indicate that the focus of the discussion was on the community's reaction to the publicly available Superior Court decision and how to effectively communicate with the public to discourage misinformation.

Accordingly, the substance of the discussion does not appear to be "litigation/potential litigation", and therefore the closed meeting was not authorized under s. 239(2)(e). In addition, legal advice was not received or discussed during this meeting and Council was not relying on the solicitor-client privilege exemption.

You also advised that there was concern that the communications company's proposal could not be discussed in a public meeting because it contained information regarding the company's fees. You noted that disclosure of that information would create an unfair advantage in the event that the Township issued a Request for Proposal.

As discussed, our Office's role as a closed meeting investigator is to review whether in-camera discussions were appropriately closed to the public under the exceptions outlined in s. 239 of the Act. In this case, discussion of fees for communication services does not fit within the cited exception (litigation/potential litigation), or with any other exception under the Act.

When we spoke, you expressed general agreement with our observations and agreed to discuss our review with Council and to add this letter as an agenda item at an open meeting of Council, so that the results of our review can be made public. Please advise us when you have had the opportunity to do so.

Under the circumstances, we will not be pursuing further review of this complaint. I would like to take this opportunity to thank you for your cooperation during this review.

Sincerely,
Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team