

February 1, 2013

Mr. Doug Luker, Clerk
Township of Tiny
130 Balm Beach Road West
Tiny, ON
L0L 2J0

Dear Mr. Luker:

Re: Complaint regarding October 29, 2012 closed meeting

I am writing further to our conversation of January 31, 2013 regarding the results of our Office's review of a complaint that Council held a closed meeting on October 29, 2012. The complaint received was that the subject matter of the meeting was not appropriate for an *in camera* session.

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 October 29 meeting, in addition to the Township's Procedure By-Law and relevant sections of the *Municipal Act, 2001* (the Act). We also spoke with the Township's legal counsel, who was present for a portion of the closed meeting.

The agenda for the October 29, 2012 Committee of the Whole meeting stated that there would be a closed session to discuss three matters:

- a) Litigation or potential litigation
- b) Advice that is subject to solicitor client privilege
- c) A proposed or pending acquisition or disposition of land

No further information was provided on the agenda about the closed session items.

The open session minutes state that Committee of the Whole proceeded *in camera* at 1:01 p.m. The resolution mirrored the wording of the agenda. No specific information about the closed session items was provided.

The first item discussed pertained to a zoning by-law. You advised our Office that the Township's solicitor was present to provide legal advice on this item. The solicitor confirmed this information.

You advised that this discussion was closed to the public under the litigation or potential litigation exception (s. 239(2)(e) of the Act) because it was possible that litigation could arise in the future due to possible changes to the zoning by-law.

When we spoke on January 31, we discussed that the exceptions to the open meeting requirements should be narrowly construed. Mere speculation that litigation may arise at some point in the future is generally not sufficient to bring a discussion within the parameters of s. 239(2)(e). As noted by the Court of Appeal in *RSJ Holdings Inc. v. London (City)* [(2005), 205 O.A.C. 150 (C.A.)]: “The fact that there might be, or even inevitably would be, litigation arising from [the by-law] does not make the ‘subject matter under consideration’ potential litigation.”

You advised our Office that there was no litigation ongoing at the time of this discussion, and no litigation had been threatened as a result of the proposed zoning by-law changes. Accordingly, this matter was not appropriate for discussion under s. 239(2)(e).

We also noted, however, that the Township’s legal counsel was present to provide legal advice during this discussion. This subject could have been closed to the public under the “advice that is subject to solicitor-client privilege” exception (s. 239(2)(f) of the Act). While this *in camera* discussion was therefore properly authorized, council should ensure that the most appropriate exception is cited for each portion of its *in camera* discussions.

At the October 29 meeting Council next discussed a review of a memorandum of understanding with the six parks and recreation associations in the Township. You advised our Office that this was discussed under the solicitor-client privilege exception.

While *in camera* council reviewed a staff report. The Director of Risk for the municipality’s insurance carrier was present to answer questions on risk management.

While *in camera* council also reviewed a legal opinion, dated January 24, 2008. The opinion appears to have been provided at the October 29, 2012 meeting as background information on the memorandum of understanding.

You advised our Office that this matter was closed to the public under the solicitor-client privilege exception because of the written legal opinion being reviewed by council. We understand that the Township’s solicitor was not present for this portion of the discussion.

We discussed that, although the January 24, 2008 legal opinion would be considered privileged, it appears that the majority of the *in camera* discussion pertained to the staff report, and the current issues with the memorandum of understanding. This portion of the conversation would not be appropriate for *in camera* discussion under s. 239(2)(f), or any other exception. Accordingly, this portion of the meeting was improperly closed to the public, in violation of the Act.

In the future, council should turn its mind to whether all of a particular discussion needs to be held *in camera*, or whether portions would be more appropriate for open session.

Finally, council reviewed an appraisal of a piece of property, which the Township was considering purchasing, under the “proposed or pending acquisition or disposition of land” exception (s. 239(2)(c)). This discussion fit within the stated exception.

When we spoke, we also discussed some other procedural issues that we identified during this review.

Resolution

As noted in a previous letter from our Office, dated May 24, 2012, the Act requires that municipalities pass a resolution to proceed *in camera* that states both “the fact of holding the closed meeting and the general nature of the matter to be considered at the closed meeting” (s. 239(4)).

In some cases there is very little information that council can provide, other than the wording of the exception being relied upon. In most cases, however, council should be able to provide some meaningful information regarding the items to be discussed. Failing to provide information about the “general nature of the matter to be considered” in such cases constitutes a procedural violation of the Act.

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...”

It appears that council continues to cite only the relevant exception in its resolution to proceed into closed session. We again encourage council to provide more meaningful information whenever possible, in keeping with the requirements of s. 239(4) of the Act.

Reporting Back:

The information reviewed indicates that council does not report back on matters considered *in camera*, other than to pass the required motions/resolutions.

As a best practice, the Ombudsman encourages municipalities to report publicly in open session on what transpired in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In



other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

When we spoke you expressed general agreement with our findings and suggestions. I requested that you share this letter with the public and with council as soon as possible, and in any event no later than at the next council meeting.

I would like to thank you for your cooperation during this review.

Sincerely,

Michelle Bird
Legal Advisor
Open Meeting Law Enforcement Team