



Ombudsman Report

**Investigation into whether
Council for the Township of Baldwin
held an illegal closed meeting on
September 8, 2014**

“Secret Ballot”

**André Marin
Ombudsman of Ontario
November 2014**

Complaint

- 1 On September 11, 2014, my Office received a complaint about a closed session held by council for the Township of Baldwin at the council meeting on September 8, 2014.
- 2 According to the complaint, council proceeded in camera to discuss and vote on candidates to fill a vacant position for a municipal works foreman. The complaint alleged that the in-camera vote was taken in violation of the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Township of Baldwin.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Investigative process

- 7 On October 6, after conducting a preliminary review of the complaint, my Office notified the township that we would be conducting an investigation.
- 8 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township's procedure by-law and the Act, as well as the meeting materials for both the open and closed sessions of the September 8 meeting. They also spoke with the Reeve, the Acting Reeve, and municipal staff.
- 9 My Office received full co-operation in this matter.

The September 8 meeting

- 10** The September 8 meeting was a regularly scheduled council meeting, which commenced at 6:30 p.m. The agenda indicated that a closed session would be held to discuss “labour relations – x3.” All council members were present for the meeting.
- 11** Council passed a resolution at 8:09 p.m. to move in camera “to discuss matters relating to labour relations.” The minutes state that, while in camera, council discussed interviews that were held earlier in the month for the position of municipal works foreman, and used a “secret ballot” vote to rank the candidates.
- 12** Municipal staff and council members we interviewed confirmed the information in the minutes. Because council members were having difficulty agreeing on the successful candidate for the position, the Reeve distributed slips of paper to each council member and asked them to rank the candidates in order of preference.
- 13** Based on this vote, direction was given to staff to offer the position to an identified individual, and to offer the position to council’s second choice if that individual declined the position. Council also provided direction to staff about the rate of pay and the term of the probation period.
- 14** Both the Reeve and the Acting Reeve also recalled some discussion in camera regarding whether one member of council had a conflict of interest in this matter. This discussion was not captured in the closed session minutes.
- 15** Council also discussed two contract matters during the in-camera session. These two items fit within the “labour relations” exception under the *Municipal Act*.
- 16** It is unclear whether any information was provided in open session about the closed session discussions; there is nothing in the open session minutes to indicate that council reported back on what occurred in the closed session, even in a general way. However, two of the people we interviewed recalled that at least some information was revealed about the discussion of the municipal works foreman position when the open meeting resumed. We were advised that generally no information is provided after a closed session, as members of the public rarely stay until after the closed meeting has ended.

Analysis

The discussion

- 17** The purpose of the closed session was to assess the qualifications of the candidates for the municipal works foreman position. Council discussed the applications and the possibility of extending an offer to a potential future employee. The labour relations exception refers to the collective relationship between an employer and its employees. The discussion therefore falls within the labour relations exception.
- 18** Council also considered the qualifications of identifiable individuals, and individual councillors expressed opinions on which candidate would be best suited for the job. The definition of “personal information” in the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA)¹ includes “the views or opinions of another individual about the individual.” Although this definition is not binding on my Office, it can provide some useful guidance as to the scope of “personal matters” for the purpose of s. 239 of the *Municipal Act*.
- 19** In this case, the discussion in camera of the qualifications of identified candidates for the municipal works foreman position was permitted by the personal matters exception of the *Municipal Act*.

The secret ballot vote

- 20** Section 244 of the Act states:

244. Except as provided in sections 233 and 238, no vote shall be taken by ballot or by any other method of secret voting, and every vote so taken is of no effect.

Section 239(6) of the Act states:

Exception

- (6) Despite section 244, a meeting may be closed to the public during a vote if,
- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
 - (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

¹ RSO 1990, c M.56

- 21 The only vote captured in the closed session minutes is a direction to staff to offer the municipal works foreman position to an identified individual. This vote was permitted under section 239(6) of the *Municipal Act*.
- 22 Council acknowledged, however, that it also used a secret ballot vote during the closed session in order to select the successful candidate for the position. This was not a procedural matter or a direction to staff, and as such, violated the Act. Council also violated section 244 of the Act, which prohibits such a vote being taken by way of secret ballot.

Procedural matters

Resolution to proceed in camera

- 23 The resolution to proceed in camera at the September 8 meeting only contained the wording of the exception council relied on to go into closed session. As noted by the Court of Appeal in *Farber v. Kingston City*², “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.”
- 24 Council should provide a brief description of the subject matter being considered in closed session, in addition to citing the exception it is relying on to close its doors. Similarly, council should provide more information in its agenda regarding what will be discussed in camera, whenever possible.

Reporting back

- 25 We were told that council generally does not follow a practice of reporting back in open session because members of the public are usually not present after an in-camera session. Nevertheless, council should report back on what occurred in camera. 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), along with information about staff directions, decisions and resolutions. In other cases, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.
- 26 The fact that members of the public may not stay for the open portion of a meeting after a closed session is not an excuse for council to refrain from formally reporting back on what was discussed. Even if no members of the

² [2007] O.J. No. 919, at page 151

public are present to hear the report, it can be recorded in the minutes for future reference.

Closed meeting record

27 It was clear from the evidence we obtained during this investigation that not all of the discussions during the in-camera meeting on September 8 were recorded in the minutes. The township should ensure that comprehensive meeting records, which include all substantive discussions, are kept for open and closed meetings.

28 I also encourage the township to consider audio recording its closed meetings, to ensure that the most complete meeting record possible is kept. As I noted in my 2011-2012 annual report on open meetings:

Audio or video recording of council meetings should be routine – not just the open sessions, but the closed ones too. This would assist immeasurably in ensuring officials do not stray from the legal requirements once they retreat behind closed doors, and would provide a clear, accessible record for investigators to review.

29 Several municipalities, including the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Town of Midland, the Municipality of Lambton Shores and the City of Oshawa, already follow this practice.

Opinion

30 Council for the township of Baldwin was permitted, under the exceptions contained in the *Municipal Act*, to meet in closed session on September 8, 2014 to discuss the qualifications of individual and identifiable candidates for the municipal works foreman position. Council's vote to direct staff to offer the position to a specific identified candidate was also permitted under s.239(6) of the *Municipal Act*.

31 However, council violated the *Municipal Act* when it voted during the closed session by secret ballot on the selection of the successful candidate for the position.

32 I am making six recommendations that I hope will help council understand its legal obligations and improve its closed meeting practices.

Recommendations

Recommendation 1

Council for the Township of Baldwin should not vote by secret ballot unless the vote falls within the narrow exceptions outlined in sections 233 and 238 of the *Municipal Act, 2001*³.

Recommendation 2

Council for the Township of Baldwin should not vote during a closed session unless the vote is for a procedural matter or to direct staff, as permitted by s. 239(6) of the Act.

Recommendation 3

Council for the Township of Baldwin should ensure that resolutions to proceed in camera include as much information as possible, and at the very least provide a general description of the subject matter to be discussed in closed session.

Recommendation 4

Council for the Township of Baldwin should follow a practice of reporting back publicly after closed sessions.

Recommendation 5

The Township of Baldwin should keep more comprehensive and accurate minutes of meetings, and should also consider audio recording closed meetings.

Recommendation 6

All members of Council for the Township of Baldwin should be vigilant in adhering to their individual and collective obligation to ensure council complies with its responsibilities under the *Municipal Act, 2001*.

³ These sections state that the appointment of the head of council of an upper-tier municipality, or the designation of a presiding officer other than the head of council, may be decided by secret ballot.

Report

- 33** OMLET staff spoke with the xx on xx to provide an overview of these findings, and to give the Township an opportunity to comment. Any comments received were taken into account in preparing this report.
- 34** My report should be shared with council for the Township of Baldwin and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario