



Ombudsman Report

**Investigation into whether
Council for the Township of Billings
held an improper closed meeting on
July 21, 2014**

“Let’s Flip For It”

**André Marin
Ombudsman of Ontario
September 2014**

Complaint

- 1 On July 23, 2014, my Office received a complaint about a closed session held by council for the Township of Billings at the council meeting on July 21, 2014.
- 2 According to the complainant, council proceeded in camera to discuss and vote on candidates to fill a vacant council position. The complaint alleged that the discussion did not fall within any of the exceptions to the open meeting requirements of the *Municipal Act, 2001* (the Act) and that the in camera vote was taken in violation of the Act.

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 properly closed 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 Billings.
- 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 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 July 21 meeting. They also spoke with the Clerk Treasurer and the Mayor.
- 8 My Office received full co-operation in this matter.

The July 21 meeting

- 9** The July 21 meeting was a regularly scheduled council meeting, which commenced at 7:30 p.m. The township council consists of five members – four councillors and the Mayor. Four members were present; the fifth council seat was vacant at the time.
- 10** During the open session, council considered applications from five members of the public to fill the vacancy on council. During this discussion, council resolved to go into closed session to discuss matters pertaining to s.239(2)(b) of the Act, i.e., regarding “personal matters about an identifiable individual.”
- 11** The Clerk Treasurer advised my Office that, as indicated on the meeting agenda, a closed session had been scheduled to deal with staff hiring, but the closed session discussion relating to the council vacancy was not planned in advance. The Mayor explained to us that council initially planned on filling the vacancy by a secret ballot vote during the open session. However, he believed councillors might want to express personal opinions about the candidates, and that this discussion should take place in camera.
- 12** The Mayor told us council carefully reviewed the open meeting provisions of the Act prior to passing the resolution to go into closed session.
- 13** The minutes of the closed session note that before the closed session, the Clerk Treasurer stated that she did not believe that the issue of selecting a councillor should be held in camera. She recommended it take place in the open. She also cautioned council against using a secret ballot vote of council members to fill the vacant seat.
- 14** The closed session minutes also indicate that the Mayor handed out slips of paper and asked council members to write the name of their choice for the new councillor on them. When these ballots were counted, the vote was tied between two candidates, and as no council members offered to change their votes, it was decided to toss a coin to determine the winner. When we spoke with the Mayor, he acknowledged to us that there was no discussion of “personal matters” relating to the candidates as he had anticipated. The Clerk Treasurer confirmed to us that the closed session minutes were accurate.
- 15** The closed session began at 8:47 p.m. and open session resumed at 8:57 p.m. The open session minutes simply indicate that the closed session involved a discussion of the five candidates to fill the council vacancy. Council then passed a resolution to appoint Ms. Sharon Alkenbrack as the new councillor.

Analysis

The closed session did not involve discussion of personal matters pertaining to any individuals. Council's primary purpose was the selection of the candidate to fill the vacant council seat. Consequently, the closed session was not permitted under the exceptions of the *Municipal Act*.

Council's closed session vote to select the member to fill the vacant seat was also not permitted under the Act.

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.

An appointment of a candidate to fill a vacant position on council is neither a procedural matter nor a direction that could ever form the subject matter of a closed session vote.

Not only was the July 21 closed session illegal under the *Municipal Act*, the vote was in violation of the Act. As the Clerk Treasurer initially told council, a vote to fill a council seat must take place in open session.

I want to stress that my Office's mandate is restricted to reviewing whether or not council complied with the open meeting provisions of the *Municipal Act*. It does not extend to commenting on the potential procedural issues surrounding the Mayor's decision to flip a coin during the closed session in order to select the new councillor.

Procedure by-law

- 16** In reviewing the Township's procedure by-law (by-law 2009-01), we observed that it states, in s.11, that matters that fall within any of the Act's nine exceptions to the open meeting rules "shall" be debated in camera. This suggestion that consideration of such issues in closed session is mandatory contradicts the provisions of the Act.
- 17** Council always has the discretion to consider these topics in open session. Only matters falling under the s. 239 (3) – relating to requests under the

Municipal Freedom of Information and Protection of Privacy Act – must be discussed in camera.

- 18** Before proceeding in camera under any of the other eight permissive exceptions, council should consider whether there is sufficient reason to exercise its discretion to exclude the public from the discussion. Council should also amend its by-law to reflect the wording of the Act.

Opinion

- 19** Our review confirmed that council for the Township of Billings contravened the *Municipal Act, 2001* when it discussed a matter in closed session on July 21 in circumstances that were not permitted under the exceptions to the open meeting requirements. Council also violated the Act when it voted in closed session on the candidates for the vacant position.
- 20** I am making four recommendations that I hope will help council understand its legal obligations and improve its closed meeting practices.

Recommendations

Recommendation 1

The Township of Billings should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 2

The Township of Billings should ensure that no vote is taken at a closed meeting, except in accordance with the *Municipal Act, 2001*.

Recommendation 3

The Township of Billings should amend its procedure by-law to reflect the discretionary nature of the majority of the exceptions to the open meeting requirements.

Recommendation 4

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

Report

- 21** OMLET staff spoke with the Clerk Treasurer and Mayor on September 17 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.

- 22** My report should be shared with council for the Township of Billings and made available to the public as soon as possible, and no later than the council meeting on October 20, 2014.



André Marin
Ombudsman of Ontario