



Ombudsman Report

**Investigation into whether
Council for the Town of Bracebridge
held illegal closed meetings on
December 9 and 17, 2014**

**André Marin
Ombudsman of Ontario
March 2015**

Complaint

- 1** On December 29, 2014, my Office received a complaint about a closed session held by the General Committee for the Town of Bracebridge on December 9, 2014, and a closed session held by council on December 17, 2014.
- 2** According to the complaint, the discussions that took place at these meetings did not fit within the exceptions to the open meeting requirements of the *Municipal Act, 2001* (the Act). In particular, the complaint alleged that council discussed the general composition of the Accessibility Advisory Committee, and that this discussion was not “personal” in nature.

Ombudsman jurisdiction

- 3** Under the Act, 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 Town of Bracebridge.
- 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 municipality’s procedure by-law (by-law 2013-55) and the Act, as well as the meeting materials for the December 9 and December 17 meetings. They also spoke with the Mayor and municipal staff.
- 8** My Office received full co-operation in this matter.

Council procedures

- 9** The town's procedure by-law states that regular meetings of council are held every third Wednesday at 7:00 p.m. The General Committee is comprised of all council members and meets every third Tuesday at 9:00 a.m. the week prior to council meetings.
- 10** Section 19 of the by-law outlines the procedures for closed meetings, and mirrors section 239 of the Act.

The December 9, 2014 General Committee meeting

- 11** The agenda for the December 9 meeting stated that the General Committee would be proceeding in camera to discuss an appointment by-law under the personal matters exception, and economic adjustments under the labour relations exception. All of council was present for the meeting.
- 12** In open session, the General Committee passed a resolution to proceed in camera under the personal matters exception found in section 239(2)(b) of the Act to consider committee appointments, and to consider salary adjustments under the labour relations exception. Only the first item was the subject of the complaint to our Office.
- 13** The closed session began at 11:18 a.m.
- 14** While in camera, the General Committee considered a confidential staff report pertaining to committee appointments for the next council term. The report identified 18 committees that required appointments, and noted that more than 40 applications had been received from individuals seeking appointment to various advertised positions.
- 15** In the report, staff suggested that most committees continue with the same structure as the previous council term, with the exception of the Accessibility Advisory Committee and two other committees. For the Accessibility Advisory Committee, the staff report recommended that the overall number of committee members be reduced, and that the number of council members on the committee be increased from one to two.
- 16** The report included an appendix (Appendix A), which outlined the former committee members, the citizen applicants, and provided recommendations for the committee appointments.

- 17** Attached as Appendix B were submissions from each prospective committee member. The applications for the Accessibility Advisory Committee provided an opportunity for the applicant to state whether they were a person living with a disability, or whether they were familiar with issues facing persons with disabilities.
- 18** Attached as Appendix C were the current terms of reference for each committee.
- 19** The closed session minutes for the meeting only capture the resolutions considered while in camera, but do not record the discussions that took place.
- 20** During interviews we were advised that, with respect to the Accessibility Advisory Committee, the in-camera discussion was about if an identified member of the public should be added to the committee. Although the reduction in the size of the committee was mentioned in the staff report, this was not discussed during the in camera session.
- 21** The General Committee directed staff to prepare a by-law to appoint specific individuals and organizations to the respective committee, board or town official positions identified in Appendix A of the staff report.
- 22** Staff also were directed to prepare amendments to the 2014-2018 Council Committees and Appointees Terms of Reference in accordance with Appendix A. There was a verbal amendment to the motion to add the identified individual discussed during the meeting to the Accessibility Advisory Committee and to accordingly increase the citizen composition of the Committee from five to six people.
- 23** These recommendations were to be brought to the December 17 council meeting for approval.
- 24** The closed session ended at 1:20 p.m.
- 25** In open session, the General Committee repeated the resolutions that were considered in camera.

The December 17, 2014 council meeting

- 26** The agenda for the December 17 meeting did not indicate that there would be a closed session.

- 27** During interviews, we were advised that council was originally going to simply approve the recommendations of the General Committee, and accordingly no closed session would have been necessary. However, a member of council had information they wanted to add about an identifiable individual and accordingly the motion was put forward to move in camera.
- 28** The open session minutes state that council passed a motion to consider two motions put forth by the General Committee separately from the rest of the other General Committee recommendations. Council also passed a motion to consider those items in closed session under the “personal matters” exception.
- 29** The closed session began at 7:28 p.m. and all of council was present.
- 30** The closed session minutes record the motions considered in camera, but there is no record of the substance of the discussion.
- 31** We were advised that the closed session discussions centered on an identified individual and their membership on the Accessibility Advisory Committee. Those present expressed opinions about this individual’s personal qualifications and past contributions to council committees.
- 32** While in camera, council directed staff to amend the motion contained in the General Committee Minutes of December 9, 2014 by removing the individual from the Accessibility Advisory Committee, thereby reducing the Accessibility Advisory Committee’s citizen composition to five people.
- 33** The closed session ended at 8:36 p.m.
- 34** When council arose from closed session, it passed a resolution to approve the council appointments identified in Appendix A, with the exception of those pertaining to the Accessibility Advisory Committee; to repeal the by-law establishing the Accessibility Advisory Committee; and to direct the Clerk to prepare amendments to the 2014-2018 Council Committees and Appointees Terms of Reference in accordance with Appendix A to the staff report.
- 35** Council voted that certain individuals be appointed to the Accessibility Advisory Committee, as identified in Appendix B to the December 17 council minutes. Appendix B was not available to the public at the time, but was available upon request the following day. The vote carried 6-3.

Analysis

- 36** The in camera discussions at the December 9 General Committee meeting centered on committee appointments in general, and an identified individual’s suitability for the Accessibility Advisory Committee in particular. At the December 17 council meeting, council continued the discussion about the identified individual. The discussions at both meetings were closed to the public under section 239(2)(b) of the Act, “personal matters about an identifiable individual, including municipal or local board employees.”
- 37** In reviewing the scope of this exception, my Office often considers decisions of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on my Office, such cases can be instructive. In Order MO-1909¹, the IPC found that the city was not required to release the names of individuals who applied to be on various committees, as the city had appropriately considered these names at an in camera session. The IPC noted that discussion of the applications for the volunteer positions was personal in nature.
- 38** In the case of the discussion that took place in camera on December 9, the General Committee was reviewing application packages that included information related to the candidates’ education and work history. With respect to the applications for the Accessibility Advisory Committee, the applications allowed the candidates to discuss their experience of dealing with disability. These discussions revealed personal information about the applicants and therefore fit within the “personal matters” exception found in s. 239(2)(b) of the Act.
- 39** The Office of the Information and Privacy Commissioner has also noted that in order to qualify as “personal information” for the purpose of the open meeting requirements, the information generally must be about an individual in their personal capacity, rather than their professional, official or business capacity². However, information about an individual in a professional capacity may still qualify as personal information, if it reveals something of a personal nature³.

¹ Order MO-1909, Temiskaming Shores (City) (Re), 2005 CanLII 56561 (ON IPC)

² Order MO-2204, Aylmer (Town) (Re), 2007 CanLII 30462 (ON IPC)

³ Order MO-2368, Clarington (Municipality) (Re), 2008 CanLII 68856 (ON IPC)

- 40** Information about a person in their professional capacity will be considered personal information if it relates to scrutiny of that individual's conduct⁴, or if the discussion involves expressions of opinion about an individual⁵.
- 41** The discussions of an identified individual that occurred in closed session on both December 9 and December 17 involved scrutiny of this individual's performance on council committees in the past, and opinions about the individual's qualifications. Accordingly, the discussions that took place on December 9 and December 17 fit within the personal matters exception as well.
- 42** Although the discussions fit within the cited exceptions, I do note that some of the public speculation about this matter could have been avoided if more information were provided to the public. Portions of the staff report that were not related to specific individuals and therefore considered confidential – such as the portion dealing with the reduction of the committee from 10 to five members – could have been made available to the public at the December 9 meeting. Similarly, Council could have made the information contained in Appendix B – specifically the individuals being appointed to the Accessibility Advisory Committee – available at the time of the vote at the December 17 meeting so that it was clear who was being appointed to the committee.
- 43** Finally, I note that, although the goal of s. 239(2)(b) is to protect the privacy of identifiable individuals, it is always open to council to seek the permission of candidates for committee positions to have their candidacy discussed publicly, in order to enhance the transparency of the process.

Procedural matters

Meeting record

- 44** The minutes for the December 9 and December 17 closed meetings only capture the resolutions considered during the in camera session, but do not capture the substance of the discussions. Staff advised my Office that this is the town's usual practice for both open and closed meetings.
- 45** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at its meetings.

⁴ Order MO-2519, Madawaska Valley (Township) (Re), 2010 CanLII 24619 (ON IPC)

⁵ Supra, Note 1

While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be referred to. In order to ensure a complete and accurate record, all substantive and procedural items discussed at a closed meeting should be recorded.

46 As discussed in my July 7, 2010 report regarding the Town of South Bruce Peninsula, a record of a closed meeting should include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any documents considered;
- any motions, including who introduced the motion and seconders;
- all votes taken, and all directions given.

47 In my 2011-2012 Annual Report on open meetings, I strongly encouraged municipalities to make audio or video recordings of council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings. More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Town of Midland, the City of Welland, the City of Oshawa, the Municipality of Brighton, the Municipality of Lambton Shores and the City of Sault Ste. Marie.

48 In this case, having an audio recording of the closed session would have provided valuable information during my Office's investigation.

Opinion

49 My investigation established that council for the Town of Bracebridge did not contravene the *Municipal Act, 2001* when it closed portions of the December 9 and December 17 meetings to the public under the "personal matters" exception.

50 I am making the following recommendations to assist the town in meeting its obligations under the Act, and in enhancing the transparency of its meetings.

Recommendations

Recommendation 1

The Town of Bracebridge should ensure that minutes of closed meetings reflect the actual substance of the discussion.

Recommendation 2

The Town of Bracebridge should implement a practice of audio or video recording closed meetings.

Report

- 51** OMLET staff spoke with the clerk and Mayor on March 12, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 52** My report should be shared with council for the Town of Bracebridge and made available to the public as soon as possible, and no later than the next council meeting.



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Ombudsman of Ontario