



**Investigation into the closed meeting
held by Norfolk County's council-in-committee
on December 1, 2015**

**Paul Dubé
Ombudsman of Ontario
May 2016**

Complaint

- 1** In December 2015, our Office received a complaint about a meeting held by Norfolk County's council-in-committee on December 1, 2015. The complaint alleged that the committee inappropriately relied on the "personal matters" exception to discuss whether to approve a legal services contract extension with two law firms. The complaint also alleged that the descriptions of this matter in the resolution to proceed in camera and on the agenda were too vague. The complaint alleged that the vague description on the agenda meant that the county failed to provide adequate notice of the intended discussion.

Ombudsman jurisdiction

- 2** 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.
- 3** 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.
- 4** The Ombudsman is the closed meeting investigator for Norfolk County.
- 5** When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

Investigative process

- 6** On February 8, 2016, we advised council for Norfolk County of our intent to investigate this complaint.
- 7** Members of the Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the county's procedure by-law and the Act, as well as the meeting agenda, minutes, and materials. They interviewed the Clerk, Deputy Clerk, County Manager, and all members of council.
- 8** We received full co-operation in this matter.

Council procedure

- 9** Section 22.1 of the county's procedure by-law¹ provides that that the council-in-committee consists of all members of council. The committee is subject to the same procedural requirements as council, with the exception that motions do not need to be seconded.
- 10** Section 5.8 provides that a complete copy of the meeting agenda and council information package shall be posted on the county's website 48 hours prior to the scheduled meeting. In addition, section 5.11 requires that the county post the annual schedule of council and council-in-committee meetings on its website.
- 11** Section 6.1 of the by-law states that all meetings shall be open to the public, subject to the listed exceptions. The by-law generally reproduces the closed meeting exceptions from the *Municipal Act*. However, the by-law has not been updated to reflect recent amendments to the Act, which mandate that discussions related to ongoing ombudsman or closed meeting investigations occur in closed session. In addition, the by-law fails to specify that requests under the *Municipal Freedom of Information and Protection of Privacy Act* must be considered in camera. Rather, this is described as a discretionary exception. Norfolk County should amend its procedure by-law to appropriately reflect the *Municipal Act's* closed meeting exceptions.
- 12** Lastly, section 6.3 of the by-law provides that before proceeding in camera, council shall state by resolution (i) the fact of the holding of the closed meeting and (ii) the general nature of the matter to be considered. If the meeting is being closed under the "education or training" exception, council must indicate that the meeting is being closed for that purpose.

December 1, 2015 council-in-committee meeting

- 13** On December 1, 2015, at 5:00 p.m., Norfolk's council-in-committee met in council chambers for a regular meeting. Notice of the meeting was provided in accordance with the county's procedure by-law.

¹ Norfolk County, by-law No 2015-25, *Being a by-law to govern the Procedures of the council of the Corporation of Norfolk County* (10 March 2015), online: <<https://norfolk.civicweb.net/filepro/documents/155169?preview=160102>>.

14 At 8:58 p.m., the committee resolved to move in camera to discuss:

A) Staff Report E.B.S 15-51
Re: Contractual Matter...

15 In addition, the agenda and resolution listed eight other matters for closed session consideration. After listing each of these matters, the resolution stated that these matters would be discussed under the closed meeting exceptions for:

personal matter(s) about identifiable individual(s) including municipal or board employees, proposed or pending acquisition or disposition of land.

16 The resolution to proceed in camera did not specify whether each individual matter was being considered under the “personal matters” and/or the “acquisition or disposition of land” exception. However, the agenda provided this information, stating for this matter:

A) Staff Report E.B.S. 15-51
Re: Contractual Matter
Pursuant to Section 239 (b) of the Municipal Act as the subject matter pertains to personal matters respecting identifiable individuals.

17 Once in closed session, the Manager of Corporate Support Services presented Staff Report E.B.S. 15-51 to the committee. Our Office reviewed a copy of this report.

Staff Report E.B.S. 15-51

18 The staff report begins by providing background information about the legal services contract extension matter. According to the report, in September 2015 council decided to exempt staff’s procurement of legal services from the county’s quotation and tendering procedures. At the same meeting, council directed staff to negotiate a four-year extension of the county’s current legal services agreements with two law firms. The extended agreements were subject to final approval by council.

19 After providing this background information, the staff report presented the fee proposals provided by the two law firms. The report provided details on the range of hourly rates that each firm would charge over the next four years. The report commented on these rates and provided details on each firm’s history with the county. It noted that the county had been well-served by both firms and that each firm had provided efficient and cost effective legal services. The report concluded

by recommending that council extend both legal services contracts for a further four years.

Committee's discussion

- 20** After the report was presented by staff, the committee discussed whether to renew the contract with each law firm. As part of this discussion, council considered the proposed rates of each law firm and the county's satisfaction with those firms. Some councillors and staff members told our Office that the performance of individual lawyers was discussed, although others were uncertain if individual lawyers were discussed by name. We were advised that council discussed the performance and responsiveness of these identified lawyers, as well as their relative expertise in different areas.
- 21** Numerous councillors told our Office that council discussed whether the county should decline to extend the contracts with the existing firms and instead go through the formal tender process. We were advised that council had discussed this same topic at a previous closed session in September 2015; at that time, council declined to put the contract out to tender. During the December 1, 2015 closed session, council revisited this issue before ultimately deciding to extend the contracts with the existing firms.
- 22** In addition, the committee considered whether it was necessary and/or appropriate for Norfolk to obtain legal services from law firms based outside the county, and discussed whether the county could obtain all of its legal services from one firm, rather than two. Councillors also advised that the county is involved in a number of ongoing legal proceedings, and the committee discussed the financial impact of transitioning to a new law firm. Those we interviewed did not recall discussing specific ongoing legal matters or legal advice related to those ongoing proceedings.

Return to open session

- 23** After the committee resolved to return to open session, it passed the following resolution related to this matter:

THAT Confidential Staff Report E.B.S. 15-51, Legal Services Contract Extension, be received as information;

AND THAT Council approve legal services contract extension with the firm of Ross & McBride for General legal Services with the firm of Hicks Morley for Labour and Employment Law Legal Services for a four-year term;

AND FURTHER THAT Council approve the fee ranges as outlined in confidential Staff Report E.B.S. 15-51;

AND FURTHER THAT staff be directed to execute the necessary contract documents with Ross & McBride and Hicks Morley for the extension of services.

24 The meeting adjourned at 10:26 p.m.

Debate among staff about closed session discussion

25 The Clerk, Deputy Clerk, and County Manager each advised our Office that there was disagreement among staff about whether the legal services contract extension matter was appropriate for closed session consideration.

26 We were advised that the Clerk told the County Manager that he did not believe any closed meeting exceptions would allow the legal services contract extension to be discussed in closed session. The Clerk recommended that the matter be discussed in public and that the staff report be released publicly after minor revisions.

27 The County Manager, in contrast, felt that it was important to discuss the matter in closed session. The County Manager and Clerk discussed how and whether the subject matter and related staff report could be modified to comply with the *Municipal Act's* closed meeting requirements. The County Manager and Clerk failed to come to an agreement on the issue, and ultimately the County Manager advised that the matter would be discussed in camera without the Clerk's agreement. The Deputy Clerk, who took the meeting minutes on December 1, 2015, told our staff during interviews that she agreed with the Clerk's assessment. At the direction of the Clerk, however, she declined to formally register her disagreement with this decision before the committee proceeded in camera.

Analysis

Personal matters – s.239(2)(b)

28 The committee relied on the “personal matters” exception to discuss extending the existing legal services contracts with two law firms.

29 The Act does not define “personal matters” for the purposes of section 239 of the *Municipal Act*. However, the related term “personal information” is defined in the *Municipal Freedom of Information and Protection of Privacy Act*, as, in part

“recorded information about an identifiable individual, including...(g) the views or opinions of another individual about the individual”. When reviewing the parameters of the open meeting exceptions, our Office has often considered the case law of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on our Office, these cases can be informative.

- 30** The IPC has determined that, in order to qualify as “personal information”, the information must be about individuals in their personal capacity, rather than their professional, official or business capacity.² However, information in a professional capacity may qualify as personal information if it reveals something of a personal nature about the individual. In IPC Order MO-2519, the adjudicator found that evaluation and performance information about employees and professionals was personal information.³
- 31** In addition, both Local Authority Services (LAS) and our Office have determined that discussions of an individual’s job performance may come within the “personal matters” exception.⁴ Further, our Office has noted that it is not necessary that the individual be an employee of the municipality; in a 2015 report regarding the Town of Cochrane, our Office found that a discussion regarding the job performance of a contractor for the municipality fell within the “personal matters” closed meeting exception.⁵
- 32** In this case, the committee discussed the performance of individual lawyers by name while deciding whether to extend the legal services contracts with the two firms where the lawyers practiced. We were advised that the committee discussed the performance, responsiveness, and expertise of these lawyers, and that this discussion was a small but relevant portion of the overall conversation. This small portion of the discussion fell within the closed meeting exception for personal matters about an identifiable individual.
- 33** However, the majority of the committee’s discussion related to the fee structure proposed by each firm, the desirability of putting the contracts out to tender, and the hurdles to obtaining legal services elsewhere. These discussions clearly did not fall within the “personal matters” exception under the *Municipal Act*.

² Order MO-2204 (22 June 2007), online: IPC <https://www.ipc.on.ca/images/Findings/up-mo_2204.pdf>.

³ Order MO-2519 (29 April 2010), online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2519.pdf>>.

⁴ Local Authority Services, *Report to the Corporation of the Municipality of Northern Bruce Peninsula* (January 2014), online: <<http://www.agavel.com/wp-content/uploads/2013/09/Northern-Bruce-Peninsula-2013-final.docx>>; Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting* (February 2015) at para 48, online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Niagara-Falls-Feb2015.pdf>>.

⁵ Ombudsman of Ontario, *Investigation into whether Council fro the Town of Cochrane held an illegal closed meeting* (January 2015) at para 23, online: <<https://www.ombudsman.on.ca/Resources/Reports/Town-of-Cochrane.aspx>>.

Accordingly, the committee was not entitled to rely on this closed meeting exception to discuss these issues in camera.

Advice subject to solicitor-client privilege – s.239(2)(f)

- 34** The committee did not cite the closed meeting exception for advice that is subject to solicitor-client privilege; nonetheless, our Office considered whether this exception would have applied.
- 35** Subsection 239(2)(f) of the *Municipal Act* permits a municipality to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose, in closed session.
- 36** In *Maranda v. Richer*, the Supreme Court considered whether solicitor-client privilege applies to the amount of a lawyer's fees and disbursements in a bill of account if no other detail is disclosed, such as the content of the legal advice.⁶ In that case, the court determined that information about the amount of a lawyer's fees is presumptively sheltered under solicitor-client privilege in all contexts. However, this presumption can be rebutted if disclosure would not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.⁷
- 37** In *Ontario (Attorney General) v. Ontario (Assistant Information & Privacy Commissioner)*,⁸ the Ontario Court of Appeal adopted this approach for determining whether legal fees were protected from disclosure under freedom of information legislation. In that case, the court determined that the total amount of legal fees paid by the Attorney General to lawyers who had acted for individuals in criminal proceedings would not reveal any client/solicitor communication. Accordingly, the court affirmed the IPC's conclusion that the information was not subject to client/solicitor privilege and could be disclosed.⁹
- 38** In this case, the council-in-committee discussed the hourly rate charged by two law firms, not the specific amount of legal fees paid by the county. The committee did not discuss specific legal matters or legal advice provided by either law firm. From the existing jurisprudence, it is unclear if the hourly rate of a lawyer, as opposed to the total amount of legal fees paid under a retainer, would be presumptively sheltered under client/solicitor privilege. However, even if it were

⁶ *Maranda v Richer*, 2003 SCC 67.

⁷ *Ibid* at para 31-33.

⁸ *Ontario (Attorney General) v Ontario (Assistant Information & Privacy Commissioner)*, [2005] OJ No 941.

⁹ *Ibid* at para 13-15.

presumptively subject to solicitor-client privilege, the presumption would be rebutted in these circumstances because disclosing the hourly rate would not directly or indirectly reveal any communication protected by the privilege. Accordingly, the committee's discussion did not fall within the exception for advice subject to solicitor-client privilege.

Procedure - notice

- 39** We received a complaint that the December 1, 2015 meeting agenda did not provide sufficient notice that the committee intended to discuss the extension of the legal services contracts. The complainant felt that the description provided by the agenda – “Staff Report E.B.S. 15-51, Re: Contractual Matter” – was too vague.
- 40** The Act does not specify the content of the meeting notice that must be given to the public. However, section 238(2.1) of the Act requires that a municipality provide for public notice of its meetings in its procedure by-law. There is no provision in the Act that requires a municipality to provide advance notice of the individual matters that will be discussed in closed session.
- 41** Norfolk's procedure by-law requires the county to post a complete copy of the meeting agenda and council information package on the county's website 48 hours prior to the scheduled meeting. In addition, the by-law requires that the county post the annual schedule of council and council-in-committee meetings on its website. Our investigation found that these requirements were met. Therefore, the meeting notice provisions of both the Act and the county's procedure by-law were satisfied for the December 1, 2015 committee meeting.

Procedure – resolution to proceed in camera

- 42** Our Office also received a complaint that the committee's resolution to proceed in camera provided insufficient information about the matter that council intended to discuss. In its resolution to proceed in camera, the committee described the legal services contract extension discussion as:

A) **Staff Report E.B.S 15-51**
Re: Contractual Matter

- 43** After listing various other matters that would be discussed during the same closed session, the resolution provided that these matters would be discussed under the exceptions for:

personal matter(s) about identifiable individual(s) including municipal or board

employees, proposed or pending acquisition or disposition of land.

- 44** The resolution did not specify whether the contractual matter was being considered under the “personal matters” and/or the “acquisition or disposition of land” exception. However, the agenda clarified that the matter was being considered under the “personal matters” exception.
- 45** Both the Act (section 239(4)) and the county’s procedure by-law require that the resolution to proceed in camera include the general nature of the subject matter to be considered. As noted by the Court of Appeal in *Farber v. Kingston City*, “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”.¹⁰
- 46** In a 2014 report regarding closed meetings in the Municipality of Kincardine, LAS interpreted this as requiring that “the wording of the resolution...do more than simply refer to the section of the *Municipal Act* that permits the closed meeting exception”.¹¹ Rather, there is a requirement that municipalities add a “level of informative detail” to the resolution.
- 47** Our Office has also recommended that councils provide more substantive detail, where appropriate, in resolutions authorizing closed sessions. For instance, in our Office’s 2015 review of closed meetings in the Municipality of South Huron, we noted that resolutions to go in camera “should provide a brief description of the subject matter to be considered in closed session”.¹²
- 48** During our discussion with the Deputy Clerk, she indicated that she felt the phrase “contractual matter” struck the appropriate balance between providing general information to the public while protecting the specific reason for proceeding in camera. Although the description does provide the public with some idea about the committee’s intended discussion, the resolution could have provided the public with additional information without undermining the reason for excluding the public (i.e. “Contractual matter – legal services contract extension”).
- 49** The county should ensure that resolutions to enter closed session maximize the

¹⁰ *Farber v Kingston City*, [2007] OJ No 919 at 151.

¹¹ Local Authority Services, *A Report to the corporation of the Municipality of Kincardine* (July 2014) at 8, online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>>.

¹² Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: <https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf>.

information available to the public while not undermining the reason for excluding the public. As a best practice, the county should also ensure that resolutions to proceed in camera clearly specify which exception the county is relying on to discuss each matter.

Opinion

- 50** Norfolk County’s council-in-committee contravened the *Municipal Act, 2001* on December 1, 2015, when it went in camera to discuss whether to approve a legal services contract extension with two law firms. While a small portion of this discussion relating to the performance of identified lawyers could have been discussed in camera under the “personal matters” exception, the majority of the discussion did not fall within this exception, or any exception, to the *Municipal Act*’s open meeting requirements.
- 51** Norfolk County did not contravene the notice requirements in the Act or its procedural by-law. However, the county did violate the requirements of subsection 239(4)(a) of the Act, as well as its procedure by-law, by failing to state the general nature of the matters to be considered in the resolution to proceed in camera.

Recommendations

- 52** I make the following recommendations to assist the county in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of the council-in-committee for Norfolk County should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The council-in-committee for Norfolk County should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

When proceeding in camera, Norfolk County should pass a resolution that clearly sets out the fact of the closed meeting and the general nature of each of the matters to be discussed.

Recommendation 4

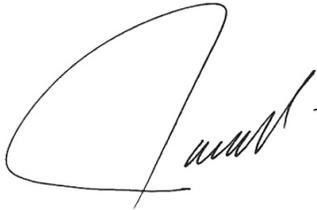
As a best practice, Norfolk County should clearly specify which closed meeting exception it intends to rely on for each individual matter discussed in camera.

Recommendation 5

Norfolk County should amend its procedure by-law to accurately reflect the *Municipal Act's* closed meeting exceptions.

Report

- 53** The county was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 54** My report should be shared with council for Norfolk County and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario