

J. Paul Dubé, Ombudsman

October 29, 2019

Council for Norfolk County
50 Colborne Street South
Simcoe, ON
N3Y 4H3

Dear Members of Council of Norfolk County:

Re: Closed meetings complaint, March 26 and April 2, 2019

On April 5, 2019, my Office received a complaint about two closed meetings held by council for Norfolk County. The complaint alleged that council's discussions regarding the hiring of an interim Chief Administrative Officer (CAO) on March 26, 2019, and April 2, 2019, did not fit within any of the exceptions to the open meeting rules in the *Municipal Act, 2001*.

I am writing to advise you of the outcome of my review and to provide resources to assist the county with continuing to adhere to the open meeting requirements.

Ombudsman jurisdiction

Under the *Municipal Act*, citizens have the right to request an investigation into whether a municipality has complied with the Act and its procedure by-law in closing a meeting to the public. The Ombudsman is the closed meeting investigator for Norfolk County.

To assist municipal councils, staff, and citizens, we have developed an online Digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's past decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the Digest to inform their discussions and decisions about whether a matter should or may be discussed in closed session, as well as issues related to closed meeting procedures. Summaries of the Ombudsman's previous decisions may be consulted in the Digest at www.ombudsman.on.ca/digest.

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10^e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel./Tél. : 416-586-3347
Facsimile/Télécopieur : 416-586-9659 TTY/ATS : 1-866-411-4211

www.ombudsman.on.ca

Review

On April 17, 2019, my Office advised the municipality that we would be investigating this complaint. We reviewed relevant portions of the municipality's procedure by-law and the *Municipal Act*, as well as agendas and minutes of the council meetings held on March 26 and April 2, 2019. In addition, we reviewed relevant video recordings of the public portions of the council meetings on those dates.

To understand the background and context of the closed session discussion, we interviewed the Clerk, Mayor, and seven other members of council.¹ We received full co-operation with our investigation.

Meeting on March 26, 2019

At 4:36 p.m. on March 26, 2019, council resolved to proceed *in camera* under the exception for personal matters (s. 239(2)(b)). The resolution did not include a description of council's intended discussion, although the meeting agenda indicated it was about "Information related to the Chief Administrative Officer position."

During this closed session, council discussed the performance of specific municipal staff members. Council also identified a potential candidate for an interim CAO position, discussed personal matters about this individual, and shared opinions about the candidate's suitability for the position.

Council adjourned the closed session at 5:18 p.m. to begin an open session. Council returned to closed session at 10:01 p.m., indicating that it was proceeding into closed session to discuss "(Continuation) ... Re: Information related to the Chief Administrative Officer position."

Based on the closed session minutes and information provided by those we interviewed, the potential candidate identified earlier in the evening met with council during this portion of the meeting. Some of those we spoke with described this as a "very informal interview." After the candidate left the meeting, council discussed the candidate's suitability for the interim CAO position.

At 11:10 p.m., council returned to open session and passed a resolution that "Council approve the appointment of an Interim CAO to be later publicly announced by [the] Mayor...."

¹ One member of council was not available to participate at the time of the investigation.

Analysis – Exception for personal matters about an identifiable individual

Council relied on the personal matters exception to discuss matters about the CAO position in closed session. The personal matters exception applies to discussions that reveal personal information about an identifiable individual.

When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Information and Privacy Commissioner (the IPC). These decisions are not binding on my Office; however, they are often informative with respect to the applicability of the open meeting exceptions in the Act. The IPC has found that, generally, information that pertains to an individual in their professional capacity will not fit within the personal matters exception.² However, in some cases, information about a person in their professional capacity may still fit within the exception if it reveals something personal or relates to scrutiny of an individual's conduct.³

In a report to the Township of Russell, my Office explained that discussions regarding the hiring of a specific individual, including their employment history and past job performance, generally fit within the personal matters exception.⁴

During the meeting on March 26, 2019, council discussed the need for an interim CAO in open session. In closed session, council discussed the performance of identifiable staff members. Council also discussed a potential candidate for the position of interim CAO, including personal information about the candidate. Council met with the candidate and discussed the candidate's suitability for the position. These discussions revealed information that went beyond professional information, and fit within the personal matters exception in the *Municipal Act*.

Meeting on April 2, 2019

We also received a complaint about a topic discussed at council's April 2, 2019 closed session. The agenda indicated that council would be discussing a "Verbal Update ... Re: Information related to the Interim Chief Administrative Officer position."

² Order MO-2204 (22 June 2007), online: IPC <<http://canlii.ca/t/1scqh>>.

³ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6 at paras 31 to 32, online: <<http://canlii.ca/t/gtp80>>.

⁴ *Russell (Township of) (Re)*, 2015 ONOMBUD 29 at paras 29 to 31, online [*Russell*]: <<http://canlii.ca/t/gtp73>>.

At 4:43 p.m., council passed a resolution to proceed into closed session under the exceptions for personal matters (s. 239(2)(b)) and advice subject to solicitor-client privilege (s. 239(2)(f)). Although the open session minutes note that council provided a description of the closed session item just prior to the statement of the resolution, the resolution itself did not include a description of matters to be discussed in closed session.

During the closed session, a council member, along with the County Solicitor, provided an update to council on negotiations regarding the employment contract with the preferred candidate for the interim CAO position, and provided legal advice in answering questions of the Committee. The meeting minutes and those we interviewed indicate that council discussed specific contractual terms and conditions during the meeting.

Analysis – Exception for personal matters about an identifiable individual

Discussions regarding the employment contract of a specific individual fit within the exception for personal matters.⁵ In a report to the Town of Mattawa, my Office determined that salary ranges are generally not considered personal information, but information about individual staff salaries and other employment terms can be discussed under the exception for personal matters.⁶

During the closed session on April 2, council discussed the hiring of a candidate and specific terms of their employment contract with the municipality. This discussion fit within the personal matters exception.

Analysis – Exception for advice subject to solicitor-client privilege

Council also cited the exception for advice subject to solicitor-client privilege to discuss the ongoing contractual negotiations with the candidate for the interim CAO position.

This exception covers discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential.⁷ The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

⁵ *Russell*, *supra* note 6.

⁶ *Mattawa (Town of) (Re)*, 2011 ONOMBUD 1 at paras 52 and 53, online: <<http://canlii.ca/t/gttg7>>.

⁷ *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<http://canlii.ca/t/h4rwt>>.

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The people we interviewed, as well as the closed meeting minutes, indicated that the County Solicitor provided council with legal advice related to ongoing contractual negotiations during the April 2, 2019 closed session. Accordingly, the discussion fit within the exception for advice subject to solicitor-client privilege.

Closed meeting resolutions

Section 239(4) of the *Municipal Act* states that council's resolution to proceed *in camera* must state the fact of the closed meeting and the general nature of the topic to be discussed. The Ontario Court of Appeal has found that resolutions to proceed *in camera* should provide a general description of the matter to be discussed in a manner that maximizes the information available to the public while not undermining the reason for excluding the public.⁸

While Norfolk County's March 26 and April 2 meeting agendas provided detailed information about the matters to be discussed in closed session, the resolutions passed by council during the meetings did not include a description of the matters to be discussed. When we discussed these requirements with municipal staff, they committed to ensuring that in future, the county's resolutions to close meetings would provide a general description of the matter to be discussed.

Conclusion

My Office's review found that Norfolk County did not contravene the open meeting rules when council went into closed session during council meetings on March 26 and April 2, 2019, to discuss the interim CAO position.

I would like to thank Norfolk County for its co-operation with my Office during this review. This letter should be provided to council and made available to the public no later than the next meeting of council.

Sincerely,



Paul Dubé
Ombudsman of Ontario

⁸ *Farber v Kingston (City)*, 2007 ONCA 173 at para 21, online: <<http://canlii.ca/t/1qtzl>>.