



Ombudsman Report

**Investigation into a complaint about a meeting
held by council for the Township of Tehkummah
on December 22, 2017**

**Paul Dubé
Ontario Ombudsman
April 2018**

Complaint

- 1 My Office received a complaint that council for the Township of Tehkummah held a meeting that did not comply with the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 The complaint alleged that township council did not provide proper notice for a special council meeting held on December 22, 2017 in contravention of the Act and the township’s own procedure by-law.

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of each of them 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 Tehkummah.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.

Council procedure

- 7 Section 238(2) of the Act requires that a municipal procedure by-law provide for notice to the public of all meetings.
- 8 S. 3 of the township’s procedure by-law (By-law No. 2015-03) states that:

Special Council Meetings [are to be] held on the 3rd Thursday of each month at 10am if necessary at the direction of the Reeve.

- 9 With reference to the calling of special council meetings, s. 5 of the procedure by-law states that a special meeting may be summoned at any time by the head of council, or upon the receipt of a petition from the majority of members of council.

According to the township, this portion of the by-law is interpreted to mean that the Reeve, as head of council, may call a special meeting of council for any time and date.

10 S. 5 goes on to state that:

[n]otice of all special meetings of council shall be given to the members [of council] through the Clerk's Office by telephone prior to the meeting. The only business to be dealt with at a special meeting is that which is issued in the notice of a special meeting.

11 S. 42 of the procedure by-law governs providing public notice of meetings:

Where municipalities must give prior notice of an action, Section 251, *Municipal Act, 2001*, that notice will be given in the manner of the agenda being posted for public viewing in the Municipal Office Complex, two (2) working days prior to the scheduled hearing.

12 S. 251 of the Act was repealed in 2006. The provision prescribed the method in which notice was to be provided if required by the Act.

13 The procedure by-law is silent on the circumstances in which council may close a meeting to the public, and does not contain any reference to the Act's closed meeting exceptions under s. 239(2). The procedure by-law is also silent on the calling of emergency meetings.

Investigative process

14 On January 16, 2018, we advised the Township of Tehkummah of our intent to investigate this complaint.

15 My Office obtained and reviewed portions of the township's procedure by-law. Additionally, we reviewed the agenda and open session minutes for the December 22, 2017 special council meeting, along with other relevant materials. Minutes were not recorded for the in camera portion of the meeting.

16 Members of my Office's open meetings team interviewed township staff including the acting deputy clerk-treasurer and an administrative assistant. At the time of the meeting on December 22, council was comprised of four members. We interviewed all members of council.

17 My Office received full co-operation in this matter.

Background

- 18 The Reeve told my Office that on December 21, 2017 he called a special meeting of council in order to discuss an identified staff member in the context of an ongoing third-party workplace investigation into harassment allegations made by a staff member. According to the Reeve, a meeting was necessary to discuss the employment status of the staff member pending the completion of the workplace investigation. The Reeve felt that it was necessary to call a special meeting rather than wait for a regular meeting because upcoming renovations, organized by the staff member, were scheduled to take place over the holiday break. Should council come to a decision regarding the staff member, the renovations would be affected.
- 19 The Reeve attended the township offices on December 21, 2017 to inform the township staff of his intention to call a special council meeting on December 22, 2017. The Reeve provided a handwritten memorandum to a staff member who is responsible for posting notice of meetings in the township offices. The handwritten memorandum called for:

an emergency “in camera” meeting (personnel) Friday Dec. 22, 2017
7 pm.
- 20 The Reeve told my Office that he believed that the regular process for providing notice of the special meeting had been initiated.
- 21 Notice of the special meeting was not posted.
- 22 The Reeve told my Office that he became aware that notice of the special meeting had not been posted when he arrived at the township offices on December 22, 2017. Despite the lack of public notice, the Reeve decided to move ahead with the meeting. He then informed council members of the special meeting by telephone call and email.
- 23 According to the open session meeting minutes, and those with whom my office spoke, the December 22, 2017 open meeting began at approximately 7:00 p.m.
- 24 The meeting was attended by three of the four sitting councillors, as well as the acting deputy clerk-treasurer who took minutes during the open session meeting. Councillor Ron Hierons was not present at the meeting.
- 25 The open session minutes do not include a record of the time council proceeded into closed session. We were told by the acting deputy clerk-treasurer that the closed session began approximately between 7:05 p.m. and 7:10 p.m. The meeting minutes indicate that council re-opened the meeting at 7:17 p.m.

- 26 According to the resolution to proceed in camera, council relied on the exception found in s. 239(2)(b) of the Act, to discuss “personal matters about an identifiable individual, including municipal or local board employees.”
- 27 Before the in camera portion of the meeting began, the acting deputy clerk-treasurer left the meeting room. Her absence was recorded in the open session minutes. The acting deputy clerk-treasurer told my Office that she left the room prior to the discussion because she felt that it was inappropriate for her to be present during the discussion which she understood was about another staff member.
- 28 We were told that there was no delegation of the minute-taking responsibilities to another member of staff. As a result, there are no minutes for the December 22, 2017 in camera session.
- 29 All of the council members who were present during the closed session agreed that the in camera discussion focused on an identifiable staff member. Council discussed suspending the staff member with pay pending the completion of the workplace investigation. According to one council member, the scheduled renovations to the township offices were briefly brought up during the discussion about suspending the staff member, who had planned the renovations. Council also reviewed a draft letter to the staff member regarding the workplace investigation and two motions to bring into the open session.
- 30 Upon re-entering open session, the minutes indicate that council passed a resolution to suspend the staff member with pay, pending the completion of the workplace investigation.

Analysis

- 31 This complaint raises the following issues:
- Relevant closed meeting exceptions, specifically:
 - Personal matters; and
 - Labour relations
 - Notice to the public
 - Calling an “emergency” meeting
 - Other procedural matters, specifically:
 - Closed meeting record
 - Delegation of minute-taking responsibilities; and
 - Audio recording.

- 32 In conducting an analysis of closed meeting cases, my Office has considered decisions of the Office of the Information and Privacy Commissioner (the “IPC”), Amberley Gavel/Local Authority Services and other persons or groups performing the function of a closed meeting investigator. Although not binding on my Office, these cases can be informative.

Closed meeting exceptions

The “personal matters” exception

- 33 We were told that council moved into closed session under the “personal matters” exception found in s. 239(2)(b) of the Act because the discussion involved details about the employment of an identified staff member.
- 34 The IPC has generally found that in order to qualify as “personal information,” the information must be about an individual in their personal, rather than their professional, capacity.¹ However, information about an individual in a professional capacity may still qualify as personal information if it reveals something of a personal nature, or if the information relates to the scrutiny of that individual’s conduct.²
- 35 In the case at hand, council’s in camera discussion centered on a specific and identifiable municipal employee. During the discussion, council deliberated about whether the best course of action would be to suspend the staff member pending the completion of the workplace investigation.
- 36 The discussion to change employment status or job performance of an individual staff member constitutes personal information. Council’s discussion included details about the staff member’s employment in the context of the workplace investigation. This information went beyond the scope of professional information and revealed inherently personal details about the staff member.
- 37 In a report to the Town of Amherstberg, my Office found that the personal matters exception was applicable to an in camera discussion about harassment allegations

¹ IPC Order MO-2204, (22 June 2007) online:

<<https://www.canlii.org/en/on/onipc/doc/2007/2007canlii30462/2007canlii30462.html?resultIndex=1>>.

² IPC Order MO-2368, (26 November 2008) online:

<<https://www.canlii.org/en/on/onipc/doc/2008/2008canlii68856/2008canlii68856.html?resultIndex=1>> and IPC Order MO-2519, (29 April 2010) online:

<<https://www.canlii.org/en/on/onipc/doc/2010/2010canlii24619/2010canlii24619.html?resultIndex=1>>.

by two identifiable town employees and their personal concerns about their work environment.³

- 38 Accordingly, the in camera discussion fit within the closed meeting exception for “personal matters.”

The “labour relations” exception

- 39 Although not cited in council’s resolution to proceed in camera, the Act’s closed meeting exception for “labour relations or employee negotiations” applies to the in camera discussion held on December 22, 2017, as council was discussing suspending an identified employee.
- 40 The labour relations exception extends beyond collective bargaining agreements to include the relations and conditions of work.⁴ In the report to the Town of Amherstberg, my Office found that an in camera discussion relating to decisions with respect to the employment status of identifiable town employees fit within the “labour relations or employee negotiations” exception.⁵
- 41 During this closed meeting, council’s discussion centered on the employment status of an identifiable staff member. Specifically, council discussed whether to temporarily suspend the staff member pending the outcome of a workplace investigation. This discussion fits within the “labour relations or employee negotiations” exception.

Notice for the December 22, 2017 meeting

- 42 The Act does not specify how notice of meetings must be provided to the public. However, s. 238(2.1) states that every municipality must pass a procedure by-law that provides for public notice of meetings.
- 43 S. 3 of the township’s procedure by-law states that special council meetings are to be held on the third Thursday of each month at 10 a.m., if necessary at the discretion of the Reeve. Pursuant to s. 5, the Reeve, as head of council, may summon a special meeting of council for any time. This power is subject to the notice requirements of the procedure by-law which requires at least two days notice for any meeting.

³ Ombudsman of Ontario, *Investigation into closed meetings held by Council for the Town of Amherstburg on January 10 and June 2, 2015* (November 2015), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/town-of-amherstburg-en>>.

⁴ Order MO-2997 (15 January 2014) online: <<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/134302/index.do?r=AAAAQAHTU8tMjk5NwE>>.

⁵ *Supra*, note 3.

- 44 The clerk's office is responsible for providing notice to council members of a special meeting by telephone. S. 42 of the procedure by-law governs public notice of meetings, including special meetings, and requires that the meeting agenda be posted in the township office for public viewing two days prior to the meeting being held.
- 45 Township staff told us that in addition to posting the agenda in the township's office, it is normal practice for staff to print and distribute flyers advertising upcoming council meetings in several locations within the township, including the local postal office. This practice is not formalized in the procedure by-law.
- 46 With respect to the December 22, 2017 special meeting, the procedure by-law requires that public notice of meetings be provided by posting the meeting agenda for public viewing in the township office at least two days prior to the meeting being held. The December 22, 2017 meeting did not meet this requirement. Not only did the Reeve call the special meeting only one day prior to the meeting date, but based on the information provided to my Office, public notice of the meeting was not posted in the township office at all or otherwise advertised in the township.
- 47 Once it became clear to the Reeve that public notice of the meeting was not provided, he told my Office that he decided to proceed with the meeting because in his opinion the circumstances surrounding the meeting constituted an emergency. The Reeve also told my Office that if public notice for the December 22, 2017 meeting was not provided, the blame lay with the staff member and not with council.
- 48 The right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirements. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings Inc.*, the open meeting requirements set out in the Act demonstrate that the public has the "right to observe municipal government in process."⁶ In this case, although it may generally be the responsibility of the staff member to provide public notice of council meetings, council is ultimately responsible for ensuring that the open meeting rules are adhered to.

Calling of an "emergency" meeting

- 49 The Reeve's handwritten note of December 21, 2017 characterizes the December 22, 2017 meeting as an "emergency." He also provided a similar description of the

⁶ *London (City) v. RSJ Holdings Inc.*, [2007], 2 SCR 588 at para 32

meeting to members of my Office in justifying holding the special meeting despite being aware that notice of the meeting had not been provided.

- 50** My Office released a report in June 2015 about the Municipality of Magnetawan, in which an “emergency,” in the context of council meetings, was described as “unexpected circumstances requiring immediate or urgent action.”⁷ In that case, my Office found that notice of the emergency meeting was provided to the public after the closed meeting had already occurred, contrary to the Act and to the municipality’s procedure by-law.
- 51** In present circumstances, the Township of Tehkummah’s procedure by-law does not contain a provision that permits the Reeve to call emergency council meetings. Thus, even if the circumstances were determined to be urgent by the township, the Reeve did not have the power to call an “emergency” council meeting with little or no notice.

Other procedural matters

- 52** During the course of my Office’s review of the materials for the December 22, 2017 meeting we observed additional procedural issues.
- 53** In June 2017, my Office provided a letter to the Township of Tehkummah in response to a complaint regarding five closed meetings held by council. The letter identified several best practices to enhance the accountability and transparency of the township’s meetings, including suggestions to improve the taking of in camera meeting minutes.⁸
- 54** According to the minutes of a council meeting on July 11, 2017, council received my Office’s letter and passed a unanimous motion (resolution no. 2017-236) to incorporate the best practices contained in the letter into the township’s “procedural policy” immediately. However, the members of council with whom my Office spoke in the course of the present open meeting investigation did not recall receiving the letter and did not know if the township implemented any of the best practices contained therein.

⁷ Ombudsman of Ontario, *Investigation into whether Council for the Municipality of Magnetawan held illegal closed meetings on February 28 and March 4, 2015* (June 2015), online:

<<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/municipality-of-magnetawan>>.

⁸ Letter from the Ombudsman of Ontario, “Complaint received by the Ontario Ombudsman regarding closed meetings in the Township”, (July 16, 2017), online:

<<https://www.ombudsman.on.ca/Files/sitemedial/Documents/Resources/Reports/Municipal/FINAL-Tehkummah--closing-letter-formatted-accessible.pdf>>.

Closed meeting record

- 55 S. 239(7) of the Act requires that a municipality record, without note or comment, all resolutions, decisions and other proceedings at its meetings.
- 56 No minutes were taken during the closed session on December 22, 2017. According to the open meeting minutes, and confirmed by those we spoke with, the acting deputy clerk-treasurer was not present during the closed session to take minutes of the meeting nor did anyone else who was present take minutes. Further, we were told that no members of council took notes during the closed session, save for the jotting down of what would be the substance of the preamble and resolution to be passed in open session.
- 57 While the Act prohibits “notes or comments” from being included in the official record, the requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.
- 58 In a 2009 closed meeting report in the City of Ottawa, Douglas R. Wallace, in his capacity as closed meeting investigator, provided the following commentary on s. 239(7) in concluding that the City of Ottawa failed to record a closed meeting:

Although subsection 239(7) of the *Municipal Act* does not define precisely what proceedings must be recorded, or specifically require the recording of each and every question asked when a matter is considered of sufficient weight to merit mention in the motion to resolved in camera, best practices at least would dictate that a record be kept of how the matter was disposed of.⁹

- 59 In a November 2015 report to the Township of Bonfield, my Office noted that the following information should be included in meeting minutes:
- Where the meeting took place;
 - When the meeting started and adjourned;
 - Who chaired the meeting;
 - Who was in attendance;
 - With specific reference to the to the clerk or other designated official responsible for recording the meeting;

⁹ Douglas Wallace, *Report to the Council of the City of Ottawa regarding the investigation of the Closed Meeting of Ottawa City Council held on January 28, 2009* (March 2009), online: <<https://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/integrity-commissioner/meetings>>.

- 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 specific documents considered;
- Any motions, including who introduced the motion and seconders; and all votes taken, and all directions given.¹⁰

60 As my Office's June 2017 letter to the Township of Tehkummah notes:

[k]eeping complete and accurate minutes of closed session meetings ensures that members of the public feel confident that matters dealt with in closed session were appropriate for in camera discussion and that requirements of the *Municipal Act* and local by-laws have been followed.

61 Accordingly, the Township of Tehkummah failed to fulfill its statutory obligation to record council's proceedings during the closed meeting on December 22, 2017.

Delegation of minute-taking responsibilities

62 S. 228(1) of the Act states that a municipality must appoint a clerk whose duty it is to record the proceedings of council. S. 228(4) of the Act states that the clerk may delegate in writing to any person, other than a member of council, any of the clerk's powers and duties.

63 Local Authority Services has interpreted s. 228(1) of the Act strictly. In a 2011 investigation into closed meetings in the Municipality of French River, it concluded that if neither the clerk nor the deputy clerk will be taking meeting minutes, the clerk must "delegate this authority in writing" or council must "appoint an acting clerk by by-law".¹¹

64 On December 22, 2017 there was no one present to take minutes. It was therefore council's responsibility, pursuant to s. 228(1) of the Act, to appoint an individual to record minutes for the closed session.

65 By failing to ensure that minutes of the closed session were recorded, council violated s. 228(1) of the Act.

¹⁰ Ombudsman of Ontario, *Investigation into the allegation that the Public Work Committee for the Township of Bonfield violated the Municipal Act, 2001 on May 19 and June 2, 2015* (November 2015), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/township-of-bonfield>>.

¹¹ Amberley Gavel/Local Authority Services, *Complaint re January 14, February 2,4, and 10, 2011* (March 2011), online: <http://web.ombudsman.on.ca/images/0/0d/FR_01-AGReport.pdf>.

Audio recording

- 66 In my Office's July 2017 letter, we encouraged the township to adopt a practice of audio or video recording its council meetings. However, despite coming to a decision to implement the best practices contained in that letter, the Township of Tehkummah still does not audio or video record its council meetings.
- 67 My Office strongly encourages 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. Many municipalities have adopted the best practice to digitally record closed sessions for the sake of accuracy.

Opinion

- 68 My investigation found that council for the Township of Tehkummah did not contravene the *Municipal Act, 2001* when it went in camera on December 22, 2017 to discuss the ongoing workplace investigation into harassment allegations made by a staff member. The discussion fit within the closed meeting exceptions for "personal matters" and "labour relations."
- 69 However, the failure of council to provide notice for the special meeting is a violation of the open meeting requirements in the *Municipal Act, 2001* and the township's procedure by-law.
- 70 In addition, council failed to ensure that minutes of the in camera meeting were recorded.
- 71 The Township of Tehkummah should update its procedure by-law to reflect the closed meeting provisions in the *Municipal Act, 2001* and to correct references to out-of-date or repealed sections of the *Municipal Act, 2001*. The Township of Tehkummah should also update its procedure by-law to formalize its general practice of posting notice of upcoming meetings in various locations throughout the municipality. The Township of Tehkummah should also consider updating its procedure by-law to provide for the calling of emergency meetings, and it should consider video or audio recording its open and closed meetings.

Recommendations

- 72 I make the following recommendations to assist the Township of Tehkummah in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Township of Tehkummah 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

All members of council for the Township of Tehkummah should be vigilant in adhering to their obligation to ensure that sufficient notice for all council meetings, including special meetings, is provided to the public in compliance with the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 3

The Township of Tehkummah should formalize its general practice of posting public notice of upcoming meetings in locations within the municipality in its procedure by-law.

Recommendation 4

The Township of Tehkummah should include provisions for the calling of emergency or urgent meetings in its procedure by-law.

Recommendation 5

The Township of Tehkummah should comprehensively review and amend its procedure by-law to accurately reflect the open meeting provisions of the *Municipal Act, 2001*, and ensure that its procedure by-law does not contain references to repealed legislation.

Recommendation 6

The Township of Tehkummah should ensure that both open and closed session minutes are kept of all meetings of council, local boards, and committees of either of them.

Recommendation 7

The Township of Tehkummah should ensure that meeting records are complete and accurately reflect all of the substantive and procedural items that were discussed.

Recommendation 8

The Township of Tehkummah should implement the practice of audio or video recording its open and closed sessions.

Report

- 73 The township was given the opportunity to review a preliminary version of this report and provided comments to our office. Comments received were considered in the preparation of this final report. The township's Reeve told us that he recognizes that the lack of closed meeting minutes was an error, and that the township will improve its procedures to fulfill its statutory obligations in the future.
- 74 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario