

BY EMAIL

January 3, 2023

Council for the Township of Prince
3042 Second Line West
Prince Township, ON P6A 6K4

Dear Members of Council for the Township of Prince:

Re: Closed meeting complaints

I am writing further to our telephone conversation on October 12, 2022 regarding the outcome of our Office's review of two complaints about an emergency closed meeting held by council for the Township of Prince (the "Township") on March 15, 2022. The complaints alleged that the Township failed to provide adequate notice of this meeting and that it was unlawfully closed to the public contrary to the open meeting rules in the *Municipal Act, 2001*.¹ One of the complaints also alleged that the Clerk did not attend the meeting and did not delegate their authority.

For the reasons set out below, I have determined that the Township of Prince did not contravene the open meeting rules in the *Municipal Act, 2001* when it discussed matters *in camera* on March 15, 2022. However, the Township did contravene its procedural by-law and the Act's open meeting requirements when it failed to make "a reasonable effort" to provide public notice for the March 15, 2022 emergency meeting. Regarding the Clerk's role, my investigation found that the Township resolved to appoint a temporary Clerk² for the March 15, 2022 meeting, but did not pass a confirming by-law to ratify this resolution.

¹ SO 2001 c 25.

² While the *Municipal Act, 2001* refers to a council's ability to appoint a "deputy clerk" who has all the powers and duties of the clerk, the term "temporary Clerk" will be used in this letter to avoid confusing this role at the March 15, 2022 meeting with the role of the Municipality's full-time Deputy Clerk, which is separate.

Ombudsman's role and authority

Under the *Municipal Act, 2001* all meetings of a council, local board, and committee of either must be open to the public unless they fall within prescribed exceptions. As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public.³ Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Township of Prince.

In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality's governing procedures have been observed.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

On April 19, 2022, my Office advised the Township of our intent to investigate this meeting. We reviewed relevant portions of the City's procedural by-law, as well as the Act. We also reviewed the meeting agendas, relevant documents, and the minutes from the open and closed sessions. We interviewed the Deputy Clerk, the temporary Clerk, all members of council, and the Township's solicitor.

According to our investigation, during the evening of March 14, 2022, the Mayor sent an email to all members of council advising that an emergency meeting would be held in closed session the following evening. We were told that council did not make any efforts to provide the public or staff with notice of the meeting.

The Mayor, two councillors, the temporary Clerk (who was appointed at the meeting), and the Township's solicitor attended the March 15, 2022 meeting in person. Another councillor attended the meeting by videoconference. One councillor did not attend the meeting.

³ *Ibid* at s 239. 1.



Council passed a resolution to appoint a temporary Clerk for the meeting. The meeting minutes indicate that council then moved into closed session “to consider an urgent human resource matter.” The meeting agenda indicated that council was relying on the closed meeting exceptions in sub-sections 239(2)(b) and (f) regarding personal matters about an identifiable individual and advice subject to solicitor-client privilege.

Once *in camera*, council discussed a human resources matter and voted to direct legal counsel regarding this matter. Council then returned to open session and reported that it “discussed an urgent human resource matter and gave direction to the Township Lawyer.” Council then voted to adjourn the meeting.

Analysis

Public notice

Subsection 239(1) of the *Municipal Act, 2001* requires that all meetings of a municipal council, local board, or committee of either be open to the public, subject to prescribed exceptions. Section 238(2) of the Act requires municipalities to pass a procedure by-law that governs the calling, place, and proceedings of meetings. Accordingly, the Township has passed By-law No. 2019-14.

Section 5.1.2 of the Township’s procedural by-law states that the Clerk shall post notice on the Township’s website of all meetings. Under section 4.4.1 of the Township’s procedural by-law, an emergency meeting “may be called by the Head of Council and/or the Clerk, without written notice, to deal with an Urgent Matter.” Section 4.4.3 of the procedural by-law states that for emergency meetings:

The Clerk-Treasurer will attempt to notify all Members, the Chief Administrative Officer and the appropriate staff about the Urgent Meeting in the most expedient manner available and as soon as possible. **The Clerk shall make a reasonable effort to advertise the Urgent Meeting to the public.** [emphasis added]

We were told that the Township did not make any efforts to provide the public with notice of the meeting. Staff, including the Clerk, were not told about the meeting before it took place. Accordingly, the Clerk did not, and could not, make any efforts to advertise the meeting.

As no efforts were taken to provide public notice, the Township did not “make a reasonable effort” to advertise the meeting to the public, as required by section 4.4.3 of the Township’s procedural by-law. Accordingly, the notice requirements were not met and the meeting was

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improperly closed to the public. Council should take care to ensure that it follows the notice requirements of its procedural by-law and the Act for all council meetings.

Applicability of cited exceptions

Council moved into closed session pursuant to the exception for personal matters about an identifiable individual under section 239(2)(b) and the exception for solicitor-client privilege under section 239(2)(f) of the Act.

The exception for personal matters applies to discussions that reveal personal information about an identifiable individual. In order to qualify as personal information, it must be reasonable to expect that an individual could be identified if the information were disclosed publicly.⁴

Our interviews and review of the meeting minutes confirmed that council discussed a human resources matter during closed session that included detailed personal information about an identifiable individual.

Regarding the exception for advice subject to solicitor-client privilege, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

Our interviews and review of the meeting minutes confirmed that legal counsel was present throughout the closed session and provided council with legal advice.

Accordingly, council's discussions fit within both the exceptions for personal matters about an identifiable individual and solicitor-client privilege.

Appointment of temporary Clerk

One of the complaints alleged that the Clerk did not delegate their clerking powers for this meeting, in violation of the Act.

⁴ *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC) at para 69, online: <<https://canlii.ca/t/1vkb1>>.



Section 228(1) of the Act states that a municipality must appoint a clerk whose duty it is to record the proceedings of council. Section 228(2) of the Act states that a municipality may also appoint deputy clerks who have all the powers and duties of the clerk.

In this case, council passed a resolution to appoint a temporary Clerk for the meeting. It was clear from the interviews and our review of the minutes that council intended to appoint a temporary Clerk and took steps to do so. However, council did not pass a confirming by-law at this meeting, which would have ratified the resolution and given it legal effect. As set out in section 5(3) of the Act, municipal power must be exercised by by-law unless the municipality is specifically authorized to do otherwise. In the future, the Township should ensure that it properly exercises its authority when appointing a clerk or deputy clerk under the Act.

Conclusion

My review has determined that council for the Township of Prince did not contravene the open meeting rules in the *Municipal Act, 2001* when it discussed a human resources matter *in camera* on March 15, 2022. However, the Township did not make “a reasonable effort” to provide public notice for the emergency meeting, contrary to its procedural by-law and the Act’s open meeting requirements. Finally, council resolved to appoint a temporary Clerk for this meeting, but did not pass a confirming by-law to ratify this resolution.

The Township of Prince was given the opportunity to review these findings and provide comments to my Office. All comments we received were considered in the preparation of this final letter. I would like to thank the Township of Prince for its co-operation during my review.

This letter will be published on my Office’s website, and should also be made public by the Township of Prince. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this letter.

Sincerely,



Paul Dubé
Ombudsman of Ontario

cc: Andrew Nowlan, Municipal Administrator, Township of Prince

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