



Ombudsman Report

**Investigation into complaints
about meetings held by
Council for the Town of Midland
on September 14 and October 13, 2015**

**J. Paul Dubé
Ombudsman of Ontario
June 2016**

Complaint

- 1 Our Office received a complaint that council for the Town of Midland contravened the open meeting rules in the *Municipal Act, 2001* when it discussed a matter about a housing development in camera on September 14, 2015. The complainant also alleged that council voted on a substantive issue related to the housing development while in the closed session, contrary to the provisions of the Act.
- 2 We received a second complaint alleging that council for the Town of Midland discussed a letter received from a member of the public in closed session on October 13, 2015, contrary to the open meeting rules.

Ombudsman jurisdiction

- 3 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.
- 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 Midland.
- 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 Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the town's procedure by-law and the Act, as well as the agenda and minutes for the council meetings on September 14 and October 13, 2015. Our Office notified the municipality of our investigation on March 1, 2016. We interviewed the complainants, the Mayor, and the town's Clerk, whose official title is Director of Corporate Services / Clerk / Interim Chief Administrative Officer. We also listened to audio recordings provided by the town of each of the in camera meetings.
- 8 My Office received full co-operation in this matter.

Council procedures

- 9** According to the town's procedure by-law, a closed session may be held to discuss subjects falling within the discretionary open meeting exceptions under s. 239(2). The by-law does not reference the mandatory requirement to discuss *MFIPPA* requests in closed session, as set out in s. 239(3)(a). It also does not include the new mandatory exception in s. 239(3)(b) for discussions about an ongoing investigation by my Office, a locally-appointed Ombudsman, or an appointed closed meeting investigator.
- 10** Midland's procedure by-law requires council to pass a resolution closing a meeting that states the fact of the holding of the closed session and the general nature of the matter or matters to be considered at the closed session.
- 11** The town's practice is to audio record closed meetings.

Meeting on September 14, 2015

- 12** The agenda for the special closed meeting of council held September 14, 2015, indicated that council would hold a closed session to discuss a number of matters, including:

Litigation or potential litigation (subsection 2 (e)) – Confidential Staff Report ENG-2015-015 dated September 4, 2015, from the Town Engineer, re. Tiffin by the Lake.

- 13** We reviewed the staff report, ENG-2015-015, that was provided to council in advance of the meeting. The report described the history of the Tiffin by the Lake subdivision in the Town of Midland. According to the report, aspects of work required by the original site plan agreement had not been completed as of June 2014, resulting in complaints from homeowners. The report indicated that the developer requested an extension of time to complete the work.
- 14** In the report, the town's engineer set out three options for council to consider with respect to the incomplete work at the development site. The report explained the benefits and drawbacks of each of the options, and recommended that council accept the third option.
- 15** On September 14, 2015, council began a closed meeting at 5:30 p.m. in council chambers. We reviewed the audio recording of this meeting.

- 16** Before discussing the staff report about Tiffin by the Lake, a member of council asked staff to explain why this matter was being discussed in camera.
- 17** The Chief Administrative Officer (CAO), who is no longer with the town, responded by stating that if council proceeded with certain options set out in the staff report, it could lead to litigation against the town. She also indicated that, although the developer is not named in the staff report, the developer is named throughout the supporting documents, such that his name would be part of the discussion.
- 18** Council asked staff whether one of the options in the report could make the town vulnerable to litigation if advance notice was not provided to one of the parties involved. The CAO responded that notice had been provided.
- 19** Council then engaged in a discussion of the issues raised in the staff report, including a summary of the history of the development and actions taken by the town with respect to the development's progress.
- 20** Council discussed other developments in the town and actions taken in the past with respect to those developments, as well as actions taken in the past with respect to this developer. During the discussion, council asked staff about particular aspects of the project, clarifying who was responsible for which aspects of the site, such as a pond, a retaining wall, and various grassy areas.
- 21** Council deliberated with respect to the three options presented by staff, and considered alternative options.
- 22** Councillors asked staff for more information about how the various options would impact the developer personally. Council briefly discussed the potential personal impact on the developer and referenced certain personal details during the discussion.
- 23** At the end of the discussion, council voted to direct staff to prepare a motion to bring "Option 3" forward for consideration in open session.
- 24** Upon returning to open session, council voted to direct staff to proceed with "Option 3" respecting the Tiffin by the Lake residential subdivision, should specific concessions as agreed upon by council not be fulfilled within a specified time period.

Analysis

Exception for litigation or potential litigation

- 25** Council cited s. 239(2)(e), which applies to discussions about litigation or potential litigation, to discuss the Tiffin by the Lake issue in camera.
- 26** At the time of the meeting, there was no specific threat of litigation or ongoing litigation with respect to the matters discussed. Instead, council discussed matters that, theoretically, could lead to litigation in the future depending on how council proceeded.
- 27** We were told that some members of staff and council felt that litigation was a possibility based on the contentious nature of the issue and the tone of communications between the town, the developer, and residents.
- 28** In order for a matter to be discussed in camera under the exception in s. 239(2)(e), there must be more than a suspicion that litigation could arise. As the courts have explained with respect to litigation privilege, “in order for a document to be privileged it is not necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation”.¹
- 29** In this case, while council may have had a suspicion that litigation could arise down the road if it were to take certain steps regarding this development, there was no real prospect of litigation at the time of the meeting. This discussion did not fit within the exception for litigation or potential litigation in s. 239(2)(e).

Exception for personal matters about an identifiable individual

- 30** Although not cited by the town, we considered whether the subject matter discussed during the meeting could have fallen under the exception in s. 239(2)(b) for personal matters about an identifiable individual.
- 31** Based on the audio record, council discussed the developer in his professional capacity throughout the closed session. However, councillors and staff also made reference to, and speculated on, personal details about the developer. Although not binding on our Office, decisions of Ontario’s Information and Privacy Commissioner can be instructive with respect to interpreting the exception for discussions of personal matters about identifiable individuals in the Act. The

¹ *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269 (O.C.G.D. — Master).

Information and Privacy Commissioner has found that information associated with an individual in a professional, official, or business capacity is not “about” the individual for the purposes of the exception to the open meeting rules. However, a discussion may cross the threshold from professional into personal matters.

32 In a 2008 decision, the Commissioner determined that a two-part test established to distinguish personal information from business information can be applied to determine whether a discussion constitutes personal matters for the purposes of the open meeting rules.² The test is as follows:

1. In what context do the names of individuals appear? Is it in a personal or business context?
2. Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?

33 In this case, the developer was discussed in a business context, as the proponent of the development project. During one portion of the discussion of the options in the staff report, council referenced and speculated about matters that would reveal personal information about the developer. This was not, however, the main focus of the discussion and did not justify discussing the development project in closed session. If it was necessary for council to have considered personal details about the developer, this portion of the discussion could have been severed from the main topic of the meeting, which was the development issues involving Tiffin by the Lake.

Meeting on October 13, 2015

34 The agenda for the October 13 council meeting states that a special closed meeting of council would be held at 6:30 p.m. in council chambers in order for council to consider “Subsection 2 (b) Personal matters about an identifiable individual, Correspondence dated October 5, 2015 re: Secondary Suites”.

35 The meeting started at 6:30 p.m. in council chambers.

36 During the closed meeting, council discussed a letter received from a member of the public. We reviewed a copy of the letter. As noted in the town’s agenda, the

² Test established in Order PO-2225 (12 January 2004), online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/PO-2225.pdf>; applied to the *Municipal Act* in Order MO-2368 (26 November 2008), online: IPC <<https://www.ipc.on.ca/images/Findings/mo-2368.pdf>>.

letter speaks to “secondary suites”, which are dwelling units within a larger detached home, such as a basement apartment.

- 37** Along with information about secondary suites, the author of the letter included an allegation of wrongdoing on the part of a member of the town’s staff.
- 38** Council discussed the appropriate process that staff and council should follow when dealing with letters from the public that could be perceived as inappropriate or abusive towards staff. They discussed the content of the letter and the conduct of the author.
- 39** Council directed staff to keep the letter confidential. Council also directed staff to review the substantive issues raised in the letter and report back to council in the future.
- 40** The closed meeting was adjourned at 6:56 p.m. and council proceeded into an open session.

Analysis

- 41** Section 239(2)(b) of the Act provides for council to discuss personal matters about an identifiable individual in a closed meeting. This is the exception that council for the Town of Midland relied upon to discuss a letter from a member of the public in camera on October 13, 2015.
- 42** We were told by town staff that the town normally makes correspondence from members of the community public. In this case, the letter was discussed in camera because it included allegations of wrongdoing on the part of a specific town employee.
- 43** Generally, discussion about a municipal employee in their professional capacity does not fit within this exception. However, as noted above, the Information and Privacy Commissioner has found that information in a professional capacity may qualify as personal information if it reveals something of a personal nature about the individual. Information about a person in their professional capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct.³
- 44** The allegations made in the letter to council were unproven and called into question the conduct and credibility of the individual employee. In a 2015 report regarding a complaint about the Town of Cochrane, our Office found a discussion

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

fit within the exception for personal matters since “council was scrutinizing the conduct and questioning the credibility of an individual who was under a contract to provide services to the town”.

- 45** During the meeting, council also discussed and made comments about the conduct of the individual who sent the letter, specifically referencing this person’s previous communications with the town, and how to best to address these communications. This discussion also fell within the personal matters exception.

Procedural issues

Resolutions to proceed in camera

- 46** On both September 14 and October 13, the meeting agenda included a general description of the matter or matters to be discussed. However, the resolution to proceed in camera as recorded in the minutes does not include the general nature of the matter(s), referring only to the relevant exception in the Act.
- 47** On September 14, the agenda indicated that council would discuss:
- Litigation or potential litigation (subsection 2 (e)) – Confidential Staff Report ENG-2015-015 dated September 4, 2015, from the Town Engineer, re. Tiffin by the Lake.
- 48** The September 14 minutes state only that council passed a resolution to proceed in closed session pursuant to subsections 2(d) – labour relations or employee negotiations, and 2(e) – litigation or potential litigation. These exceptions are not linked to any particular topic of discussion.
- 49** Similarly, the October 13 agenda indicates that council would hold a closed meeting to consider:
- Subsection 2 (b)
Personal matters about an identifiable individual
Correspondence dated October 5, 2015 re: Secondary Suites
- 50** The October 13 minutes state only that council resolved to move into closed session pursuant to s. 239(2)(b) of the Act – Personal matters about an identifiable individual.
- 51** While the Town of Midland audio records its closed meetings, it does not record the open portion of its meetings. As the resolution to close a meeting is passed in

open session, the resolutions on September 14 and October 13 were not recorded for our Office to review.

- 52** During interviews, the Clerk confirmed that the minutes reflect the entirety of the resolution passed on both meeting dates. We were told that the town's practice is to include the general nature of the matter(s) to be discussed as part of the meeting agenda, but to limit the resolution to the exception relied upon.
- 53** Under s.239(4) of the Act, before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting. This is also required by the town's procedure by-law.
- 54** The courts have held that municipalities should maximize the information provided in a resolution while not undermining the reason for holding a closed meeting.⁴ It is clear that the Town of Midland would not undermine the reason for closing the meeting by providing more information about the matters to be discussed, because that information is already being published on the town's agendas.
- 55** To comply with the Act and its procedure by-law, Midland should ensure that resolutions to proceed in camera include the general nature of the subject matter(s) to be discussed, as is currently provided in the town's meeting agendas. The resolution should also make clear which exception is cited with respect to each topic of discussion.

Voting

- 56** A complainant alleged that, during a closed session on September 14, 2015, council voted on the Tiffin by the Lake issue. The complainant told us that council appeared to have voted in camera because the vote in open session referred only to "Option 3", without providing additional information to the public.
- 57** According to the audio recording reviewed by our Office, council voted in closed session to direct staff to bring "Option 3" forward for council's consideration in open session. Council did not vote on the substantive issue in closed session, but rather voted to give directions to staff. In the open session that followed, council voted to direct staff to pursue the third option as set out in the staff report.

⁴ *Farber v. Kingston*, [2007] O.J. No. 919.

- 58** The *Municipal Act* requires all votes to take place in open session, unless the meeting is legally closed under s. 239(2) or (3), and the vote is for a procedural matter or to give instructions to staff.
- 59** As explained above, the closed meeting discussion about the three options presented to council by staff on September 14, 2015 did not fit within the exception in s. 239(2)(b) of the Act for personal matters about an identifiable individual. While the brief discussion about personal matters about an identifiable individual did fit within the exceptions in the Act, the vote related to the broader substantive discussion.
- 60** Accordingly, the vote to direct staff to bring forward “Option 3” for consideration in open session was contrary to s. 239(5) of the Act.

Opinion

- 61** Council for the Town of Midland violated the *Municipal Act, 2001* on September 14, 2015 when it discussed matters in camera that did not fit within the exception in s. 239(2)(e) for discussions about litigation or potential litigation, or any other exception to the open meeting rules.
- 62** During the discussion on September 14, 2015, council referred to personal information about an identifiable individual. Although these references fit within the exception in s. 239(2)(b) of the Act, they were not the main focus of the discussion and did not justify holding the entire meeting in closed session.
- 63** Council for the Town of Midland violated s. 239(5) of the Act when it voted to give directions to staff during a meeting that was not permitted to be closed to the public on September 14, 2015.
- 64** Council for the Town of Midland did not contravene the *Municipal Act*’s open meeting rules on October 13, 2015, as its discussions fit within the exception for personal matters about an identifiable individual in s. 239(2)(b) of the Act.
- 65** Council for the Town of Midland violated the procedural requirement in s. 239(4) of the Act and its procedure by-law by failing to state the general nature of the matter to be considered in the resolutions to go in camera on both September 14 and October 13, 2015.

Recommendations

Recommendation 1

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

Recommendation 2

The Town of Midland should ensure that each resolution to close a meeting includes both the fact of holding the closed meeting, and the general nature of the matter(s) to be discussed, in accordance with the *Municipal Act, 2001*, and the town's procedure by-law.

Recommendation 3

The Town of Midland should amend its procedure by-law to include the mandatory exceptions to the open meeting rules in s. 239(3)(a) and (b) of the *Municipal Act*.

Report

- 66** The municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. No comments were received.
- 67** 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.



J. Paul Dubé
Ontario Ombudsman