



Ombudsman Report

**Investigation into the Municipality of
Brighton's alleged violation of the
Municipal Act, 2001 on May 28, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
October 2015**

Complaint

- 1** On June 9, 2015, my Office received a complaint about a closed meeting held by council for the Municipality of Brighton on May 28, 2015.
- 2** According to the complaint, council proceeded in camera to discuss and vote on the termination of a senior municipal employee. The complaint alleged that the in camera vote was taken in violation of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 3** Under the Act, 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 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 Municipality of Brighton.
- 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** On June 23, 2015, my Office advised council we would be investigating this complaint.
- 8** Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, materials for the meeting in question, and other supporting documentation. They spoke with the Mayor and the acting Clerk.
- 9** My Office received full co-operation in this matter.

Council procedures

- 10** The municipality's procedure by-law (by-law 097-2013) provides that all meetings of council must be open to the public, subject to the exceptions to the open meeting requirements outlined in the Act.
- 11** Before closing a meeting to the public, section 4.6(4) of the by-law requires council state by resolution the fact it will be holding a closed session and the general nature of the matter to be considered.
- 12** Sections 4.6(5 and 6) state that a meeting shall not be closed to the public during the taking of a vote, unless the vote is for a procedural matter or for giving direction or instruction to staff. This section of the by-law refers to voting requirements in "section 244" without clarifying that this refers to a section of the *Municipal Act, 2001*, not the procedure by-law.
- 13** Section 8.4 provides that votes will be taken by a show of hands, counted by the presiding officer. A councillor may request a recorded vote following the show of hands.
- 14** Council for the Municipality of Brighton has adopted the practice of audio recording the open and closed sessions of council. I commend this practice because it provides the clearest, most accessible record for closed meeting investigators to review. It also assists in ensuring that officials do not stray from the legal requirements during closed meetings.
- 15** However, our investigation found that the municipality experienced technical issues with the audio recorder during the May 28, 2015 meeting (as well as the two preceding meetings). Audio recordings were therefore unavailable for my Office's review.

The May 28 meeting

- 16** On May 28, 2015, council held a special meeting at 10:00 a.m. in council chambers. Notice of the meeting was provided on the municipality's website. The agenda indicated that two matters would be discussed in closed session. The vote, which was the subject of the complaint, was related to council's discussion of the second matter. All council members, as well as a municipal solicitor, were present for the meeting.

17 After the meeting was called to order and the agenda was approved, council immediately resolved to move in camera to consider, in part:

2. A matter under Section 239.2(b) *being personal matters about an identifiable individual, including municipal or local board employee.*

This is the same description provided in the meeting agenda.

18 In their interviews, the Mayor and acting Clerk indicated that this matter related to a report from the municipality's solicitor. The report provided suggestions to council related to various employees' compensation. During the closed session, council evaluated employees' individual job performance and determined whether to alter compensation for several individuals. Employee compensation was discussed in dollar terms as well as by pay grade and level.

19 As a result of this discussion, council voted to terminate one employee and alter the compensation of several others. Each of these resolutions was voted on by a show of hands.

20 My Office reviewed each of these in camera resolutions. In each, council purported to directly terminate or modify the compensation of an identified employee; the resolutions did not direct staff to take these actions, but rather indicated that council had arrived at a substantive decision.

21 Following these resolutions, council resolved to return to open session. The open meeting minutes include a list of the resolutions passed in closed session. The resolution at issue in this complaint – the termination of a senior municipal employee – is listed as “**Resolution No. 2015-443** a personnel matter”. The resolutions altering the compensation levels of various employees are similarly listed as “**Resolution No. 2015-###** a personnel matter”.

22 My Office also reviewed other resolutions voted on by council during the same closed session discussion. These resolutions are listed as: “**Resolution No. 2015-###** to give direction to staff”. My Office's review of these earlier resolutions indicates that each was appropriately phrased as a direction to staff.

23 The meeting adjourned at 2:12 PM.

Analysis

The resolution to proceed in camera

24 Council’s resolution to proceed in camera stated that a closed session would be held to discuss, in part, personal matters about identifiable individuals. However, the resolution failed to provide meaningful information to the public about the issues to be discussed.

25 Section 239(4)(a) of the Act requires municipalities, before holding a closed meeting, state “the fact of holding a closed meeting and the general nature of the matter to be considered at the closed meeting”. This requirement is echoed in section 4.6(4) of the municipality’s procedure by-law.

26 As noted by the Ontario Court of Appeal in *Farber v. Kingston City*,¹

[T]he 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.

27 In a 2014 report regarding closed meetings in the Municipality of Kincardine, Local Authority Services (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”.² Further, there is a requirement that municipalities add a “level of informative detail” to the resolution to enter closed session. In reaching this conclusion, LAS noted that the principles of openness and transparency are at the core of the open meeting provisions of the *Municipal Act*, and that these principles require maximizing the information available to the public.

28 In this case, merely citing the applicable closed meeting exception does not maximize the information available to the public without undermining the reason for excluding the public. A more descriptive resolution, such as a resolution indicating the matter related to “staff compensation”, would have provided more information to the public without undermining the reason for meeting in camera. In the interest of transparency, the Municipality of Brighton should ensure that

¹ [2007] OJ No 919, at pg 151.

² Local Authority Services, *Report to the Corporation of the Municipality of Kincardine Regarding Allegations of Improperly Closed Meetings of the Council for the Municipality of Kincardine Between February 6, 2013 and January 20, 2014*, (July 2014: Amberley Gavel Ltd.) online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>> at pg 8.

resolutions to enter closed session contain at least a general description of the issue to be discussed.

The discussion

- 29** Council relied on the “personal matters about an identifiable individual” exception in section 239(2)(b) of the Act to evaluate the job performance and salaries of various employees who were identified by name.
- 30** The Act does not define “personal matters” for the purposes of section 239, but the related term “personal information” is defined in the *Municipal Freedom of Information and Protection of Privacy Act* as including “recorded information about an identifiable individual, including...(g) the views or opinions of another individual about the individual”.³
- 31** LAS and my Office have determined that discussions of employee performance properly fit under the personal matters exception.⁴ LAS has also determined that matters related to an individual’s salaries, fees for service and overtime requests fall within the personal matters exception.⁵ Similarly, in a 2010 investigation into closed meetings in the Town of Mattawa, my Office noted that an individual’s salary amounted to personal information.⁶
- 32** In this case, council was discussing specific salary and performance information about named employees. Accordingly, the discussion fell within the exception contained in section 239(2)(b).

³ *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, s 2.

⁴ Local Authority Services, *Report to the Corporation of the Municipality of Northern Bruce Peninsula with Respect to a Meeting Held March 11, 2013*, (January 2014: Amberley Gavel Ltd.) online: <<http://www.agavel.com/wp-content/uploads/2013/09/Northern-Bruce-Peninsula-2013-final.docx>>; *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013*, (February 2015: Ontario Ombudsman) online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Niagara-Falls-Feb2015.pdf>> at para 48.

⁵ Local Authority Services, *A Report to the Council of the Township Of Madawaska Valley*, (June 2013: Amberley Gavel Ltd.) online: <http://www.agavel.com/wp-content/uploads/2013/09/Madawaska_Valley_2013.doc>.

⁶ *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings*, (December 2010: Ontario Ombudsman) online: <<http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>> at para 53.

The votes in closed session

33 Under section 239(6)(b) of the Act, council may only vote in closed session if:

the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

34 This exception allows a council to preserve the confidential nature of the closed meeting while nonetheless giving effect to council's decisions through directions to staff.

35 Section 4.6(5) and (6) of Brighton's procedure by-law mirror these provisions of the Act.

36 In 2012, LAS determined that the voting provisions of the Act can be breached even if a council or committee does not take a formal vote on a matter; rather, the mere act of coming to substantive conclusions is a violation of the voting prohibition.⁷ Similarly, my Office concluded in 2011 that informal "straw polls" and "show of hands" can constitute a prohibited "vote" under the Act.⁸

37 Council voted by a show of hands on five resolutions that technically did not fall within the exception outlined in section 239(6) of the Act. The votes were not regarding a procedural matter and they were not properly phrased as directions to staff. Rather, council directly resolved to terminate one employee and alter the compensation of others.

38 In their interviews, the Mayor and acting Clerk acknowledged that the resolutions were not worded as directions to staff. However, each reiterated that the substance and intention of the resolutions was to provide direction to staff.

39 I concur with their assessment. My review indicates the purpose and effect of the resolutions was to provide direction to staff. Had the resolutions been properly worded as directions to staff, they would have been completely permissible under

⁷ Local Authority Services, *Report to the Corporation of the Town of Georgina Regarding the Investigation of the Closed Meetings of the Town Of Georgina Council and Committee of the Whole Held on Various Dates in 2011 and 2012*, (September 2012, Amberley Gavel Ltd.) online: <http://www.agavel.com/wp-content/uploads/2013/09/Georgina_Closed_Meeting_Report_Sept_2012.doc>.

⁸ *Investigation into whether the Town of Amherstburg Council held multiple closed meetings in contravention of the Municipal Act: "Behind Closed Doors"*, (December 2011: Ontario Ombudsman) online: <http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/AmherstburgfinalDec9-for-web_1.pdf> at pg 12.

the Act. However, because the resolutions were not properly worded, council committed a technical violation of the voting provisions in the Act and the municipality's procedure by-law.

Opinion

- 40** Council for the Municipality of Brighton was permitted, under the exceptions contained in the *Municipal Act, 2001*, to meet in closed session on May 28, 2015 to discuss the performance and compensation of various municipal employees.
- 41** However, council technically contravened the Act and its own procedure by-law when it voted on five resolutions in camera. While the substance of these resolutions was to direct staff, the wording of the resolution did not reflect this intent.
- 42** My investigation also found that council for the Municipality of Brighton violated section 239(4)(a) of the *Municipal Act, 2001* by failing to state by resolution the general nature of the matters to be considered in closed session.

Recommendations

- 43** I am making the following recommendations to assist council for the Municipality of Brighton to improve its practices with respect to open meetings.

Recommendation 1

All members of council of the Municipality of Brighton 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 Municipality of Brighton should refrain from voting on matters in closed session unless the vote is for a procedural matter or for giving direction to staff.

Recommendation 3

The Municipality of Brighton should ensure that closed session resolutions intended to provide direction to staff are clearly worded as such.

Recommendation 4


The Municipality of Brighton should ensure that its resolutions to proceed in camera provide a description of the issue to be discussed, as well as the exception authorizing the discussion.

Recommendation 5

The Municipality of Brighton should ensure that its audio recorder is functioning properly for each meeting of council.

Report

- 44** OMLET staff spoke with the Mayor and acting Clerk on October 16, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 45** My report should be shared with council for the Municipality of Brighton and made available to the public as soon as possible, and no later than the next council meeting.



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